In the Supreme Court
OF THE
United States

October Term 1929.

No. 7

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THE ANN ARBOR RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,

Appellees.

BRIEF OF APPELLANTS.

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Chronology.

August 31, 1923	First complaint filed (R. 5).
January 30, 1925	Hoch-Smith Resolution signed.
June 25, 1925	Commission finds rates not unreasonable (R. 281).
March 2, 1926	Commission denies complainants' application for reconsideration (R. 6).
December 27, 1926	Second complaint filed attacking the rates under the Act and the Resolution (R. 139).
July 20, 1927	Commission makes order reducing rates here attacked (R. 6).
November 14, 1927	Commission makes Report on Further Consideration refusing to modify Report and Order (R. 8).
November 23, 1927	Carriers file Bill in Equity to annul Order (R. 1).
January 18, 1928	District Court denies stay and preliminary injunction (R. 99).
February 10, 1928	Rates published by carriers under protest.
May 9, 1928	District Court enters Final Decree dismissing carriers' bill and denies stay pending appeal (R. 107).
May 10, 1928	Appeal allowed (R. 126).
May 28, 1928	Motion for stay pending appeal denied.
February 25, 1929	Appeal argued on merits in this Court and submitted.
May 27, 1929	Submission set aside and cause restored to the docket for reargument.

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Appellants,
vs.
THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and THE CALIFORNIA GROWERS' & SHIPPERS' PROTECTIVE LEAGUE,
Appellees.

BRIEF OF APPELLANTS.

This is an appeal from a decree of the United States States District Court for the Northern District of California (constituted as provided in the Urgent Deficiencies Act of Oct. 22, 1913 (38 Stats. 219)),

(NOTE: All references thus (R. .....) are to pages of the Transcript of record.)

(All italics are ours.)

which dismissed a bill filed in behalf of more than four hundred carriers to annul an order of the Interstate Commerce Commission.

Opinions.

The Memorandum Opinion of the District Court refusing to grant a temporary injunction is reported in *Ann Arbor R. R. Co. v. United States,* 30 Fed. (2d), 940. The Memorandum Opinion of the District Court dismissing the bill is not reported but appears at page 105 of the record.

The Report and Order of the Commission complained of, which reduced the rates for the transportation of fresh deciduous fruits from California to Eastern points is reported in *California Growers' and Shippers' Protective League v. Southern Pacific Co.,* 129 I. C. C. 25; 132 I. C. C. 582.

The Questions Presented.

The carriers contend that the Commission, in reducing the rates for the transportation of deciduous fruits from California to the East, did so, not because the old rates were thought to be unreasonable, but solely in response to a supposed mandate found in the Hoch-Smith Resolution (43 Stats. 801, 49 U. S. C. section 55) directing that "In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible

lawful rates compatible with the maintenance of adequate transportation service".

The carriers contend that in so doing the Commission misconstrued and misapplied the Resolution in the following respects:

(a) By construing the Resolution as requiring it to reduce an existing rate, not unreasonable in itself, if that rate was higher than the lowest possible lawful rate, as defined by the Commission, whereas the Resolution, properly construed, did not change existing law, under which the Commission has no power to lower a rate unless it is found to be unreasonable, as defined in the Interstate Commerce Act;

(b) By construing the Resolution as requiring, in the case of agricultural commodities suffering from depression, a lower standard of rates than is applied to other commodities, whether or not such depression is caused by, or reflected in transportation, whereas the Resolution, properly construed, made no change in the existing law, under which but one standard of reasonableness is fixed;

(c) By construing the Resolution as requiring it to reduce a rate, not found to be unreasonable under the Act, although the particular carriers concerned, and the carriers as a whole, were not earning the fair return specified in section 15a of the Act;

(d) By applying the Resolution in a proceeding involving a single rate, when the Resolution was intended to and could be applied only in the general investigation therein ordered to be undertaken;

(e) By imposing upon the carriers the burden of proving that their existing rates were not unreasonable and that such rates were the lowest possible lawful rates as defined by the Commission;

(f) By construing the Resolution as permitting the fixing of rates which returned slightly over operating expenses, or which afforded a slight profit, whereas the Resolution did not change the law under which the carriers are entitled to a substantial profit;

(g) By construing the Resolution as effecting a revolutionary change in the whole policy of rate regulation, and as repealing fundamental provisions of the Act, in violation of settled rules of statutory construction that subsequent legislation, unless a contrary intent is unequivocally expressed, should be interpreted consistently with the body of law to which it relates;

(h) By construing the Resolution in a manner which would render it unconstitutional as exceeding the proper scope of regulation of private property devoted to a public service and as being a regulation of industry and not a regulation of commerce, hence an exercise of a power not delegated to Congress itself, and incapable of delegation by it to the Commission.

It is further contended that the rates prescribed by the Commission are in fact confiscatory in that they fail to afford the carriers the substantial return to which they are entitled under the Constitution, and in fact cause the traffic to be transported at a loss as

compared with costs exceeding $2.99 per car, or over $240,000 per year.

The aggregate revenue accruing to the carriers from this traffic exceeded $36,000,000 per annum under the old rates. The reduced rates ordered by the Commission will decrease the revenue of the carriers by an amount in excess of $2,700,000 per annum based upon the 1926 traffic, and will, they claim, cause the traffic to be handled not only without profit, but at an actual loss, beyond the cost of carriage, in excess of $240,000 per annum (R. 14).

With the exception of the question of whether the rates prescribed are confiscatory, the issues are legal and not factual. The essential facts upon which we rely are disclosed on the face of the Commission's Reports and the errors of the Commission in the interpretation and application of the Resolution fully appear therein. Even on the question of confiscation the ultimate facts appear in the Commission's Reports, although some reference will be required to the record for the detailed evidence which the court must examine in connection with the issue of confiscation.

THE FACTS.

The California deciduous fruit industry.

California produces and ships the bulk of the fresh deciduous fruits produced and shipped in the United States. The principal fruits, excluding apples which are not involved here, are grapes, peaches, pears,

plums, apricots and cherries.* By far the most important are grapes. Of these, California, in 1926, shipped 81% of the total carload shipments in the country (R. 19). Most of the remainder are produced in New York, Michigan and Pennsylvania (Exhibit No. 18, R. 218).

The production of deciduous fruits occurs throughout the entire state of California and is one of the most important agricultural activities therein. The transportation of this fruit from California to the East is the largest single item of transcontinental railway traffic and constitutes the greater part of the total perishable traffic (R. 18, 19). The total revenue involved exceeded $36,000,000 annually under the old rates. On the Southern Pacific, one of the principal lines involved, 6.2% of its total freight revenue was derived from deciduous fruit traffic (R. 425).

In 1926, 1,053,755 tons of deciduous fruits were shipped to the East under the old rates, moving in 75,083 cars, of which 58,334 were of grapes, 9,523 of pears, 4,741 of plums and 1,093 of peaches (R. 19).

How the traffic is assembled and moved.

The deciduous fruit traffic originates at hundreds of shipping points scattered throughout California. 51% of the traffic originates on branch lines of the major carriers and 17½% on independent short lines (R. 19). The perishable nature of the commodity requires the utmost expedition and special train service in dis-

*As used throughout this discussion the term "deciduous fruits" means fresh deciduous fruits, other than apples.

tributing empty cars at these many loading points and the movement of the loaded cars to the points where they are concentrated in trains for Eastern movement. The concentration points are Roseville and Colton, on the Southern Pacific, Bakersfield on the Santa Fe, Sacramento on the Western Pacific and San Bernardino on the Union Pacific (R. 285). Almost all of the traffic moves to destinations east of the Mississippi River and north of the Ohio River. However, practically every railroad in the United States participates to some extent in the California fruit traffic, indicated by the naming of over 450 carriers as defendants in the proceeding before the Commission.

Unusual characteristics of the traffic.

The deciduous fruit traffic has many characteristics which distinguish it from ordinary traffic.

1. It is seasonal in character. Movement in substantial quantities begins in June and ends in November, but the peak of the movement is in September and October. In 1925 more than 70% of the traffic moved in these two months (Exhibit 52, folio 389).

2. Deciduous fruit, by reason of its perishable nature, is moved with unusual dispatch. A 154-hour schedule is in effect from California points to Chicago as compared with the ordinary schedule for other traffic of 180 hours or longer (R. 326).

3. All these fruits move in refrigerator cars, a special type of equipment more expensive than any other in freight service with the exception of tank cars, their cost being about 60% more than box cars.

They are proportionately more expensive to maintain and operate (R. 45), and are heavier and hence more expensive to haul than any other type of freight car. Thousands of such cars are owned and maintained by the carriers primarily to accommodate this traffic, and although such cars are used wherever possible in other service, many of them remain idle throughout the entire year except in the fruit season.

4. The heavy weight of the refrigerator cars results in a weight of equipment disproportionate to the weight of the paying load. In 1926 the paying load in the case of these deciduous fruits was but 34.9% of the gross weight hauled as compared with 50% to 60% for most commodities (R. 45).

5. There is a high percentage of empty haul. The loaded movement is almost exclusively eastbound. The necessity for securing prompt return of the cars to California and their relative unsuitability for other traffic prevent the general use of these cars for other purposes, and result in a large percentage of empty movement. In 1926 over 80% of the cars moving eastward under load were returned empty to California, and the empty haul of refrigerator cars was 67.58% of the total loaded haul both eastbound and westbound, as compared to a ratio of empty to loaded movement for all other freight equipment of 44.5% (R. 45).

6. Loss and damage claims are higher on deciduous fruits than on other traffic because of the perishable nature of the commodity. In 1926 claim payments made by four originating trunk lines and their short line connections for loss and damage on deciduous fruit shipments amounted to 2.77% of the total rev-

enue from this traffic (R. 46), as compared with claim payments on all traffic by the Santa Fe of 1% of the total freight revenue (R. 307).

7. Special terminal service accorded to deciduous fruit traffic in the larger cities, increases the carrier's costs. For example, the rentals alone for the Duane Street Pier of the Erie Railroad in New York used for the traffic amount to $3.22 per car handled (R. 47).

8. There are numerous diversions and reconsignments of shipments en route. In 1926 75% of the deciduous fruit cars moved over the Santa Fe were diverted one or more times. In 1926 the average diversions per car were 1.07 (R. 47). No charge is made for diversions west of Chicago. These diversions result in breaking up the trains and reallocation of cars at almost every division point west of Chicago, thus destroying the advantage of trainload movement.

9. The fruit is shipped in most instances before it is sold. Approximately 70% is sold after arrival in the East, only about 30% being sold before shipment (R. 172). The usual practice is for the shipper to start his cars eastward without a definite destination, diverting and reconsigning the cars en route to various possible markets, eventually sending them to the markets which seem to offer the best opportunity of securing maximum prices.

Increase in the production and shipment of deciduous fruit.

The production of deciduous fruits and the shipment thereof from California to the East has had a remarkably rapid and consistent growth. From 6326

carloads in 1905 the volume of shipments rose to 86,795 carloads in 1925, and 78,803 carloads in 1926, an increase of more than 1200% in 22 years. Grapes constitute the greater part of the traffic and the shipment of grapes has increased even more rapidly than the other fruits. The following table (R. 223) shows the carload shipments by years:

Year	*Total*	*Grapes*
1905	6,326	1,602
1906	5,557	2,052
1907	6,459	3,460
1908	10,719	3,819
1909	13,122	5,880
1910	11,936	4,948
1911	12,539	6,374
1912	13,344	6,357
1913	13,332	6,363
1914	16,146	8,773
1915	16,778	9,563
1916	17,891	9,722
1917	24,628	13,944
1918	27,417	16,358
1919	29,971	19,228
1920	35,246	24,152
1921	40,209	28,419
1922	53,961	41,463
1923	69,777	52,339
1924	66,786	54,775
1925	86,795	71,155
1926	78,803	60,786
1927*	89,835	72,330

In 1905 grapes constituted 25% of the total traffic, rising to 40% in 1910, 57% in 1915, 68% in 1920, 82% in 1925, and 77% in 1926. The increase in the

*Shown by affidavit (R. 104).

movement of deciduous fruits, other than grapes, was 381% between 1905 and 1926, while for grapes the increase in the same period was 3794% (R. 223). The shipment of grapes for juice purposes, of minor proportions prior to the enactment of the prohibition law, has increased to a total in 1926 of over 40,000 cars. Juice grapes amount to about 70% of all the grapes shipped (R. 19) and constitute approximately 54% of the total traffic involved.

The increase in production and in the acreage devoted to deciduous fruit production has been equally rapid and consistent. The acreage in grapes increased from 434,907 in 1923, to 635,236 in 1926, or 46% increase in three years (R. 64). An additional 30,000 acres is not yet in bearing (R. 490). The annual increase in the production of all deciduous fruits has averaged about 12% for the three or four years prior to 1927 (R. 188). In the period 1924 to 1926 the production in California increased as follows: Pears 62%, plums 82% and grapes 33-1/3% (R. 25).

The depression in the California deciduous fruit industry.

The complainants before the Commission alleged that there was a depression in the California deciduous fruit industry and this depression had existed for five years. But it was found by the Commission that the depression does not extend throughout the entire industry, and that the prices of peaches and apricots have materially improved (R. 25). The depression is particularly noticeable in the grape industry (R. 21, 22).

The Commission found the average price received in Eastern markets for California deciduous fruits for each year since 1917, to be as follows (R. 23):

	Average price per 100 pounds.		*Average price per 100 pounds.*
Year 1917	$5.43	Year 1922	$6.74
Year 1918	6.93	Year 1923	6.19
Year 1919	7.99	Year 1924	6.58
Year 1920	9.97	Year 1925	5.60
Year 1921	7.82	Year 1926	5.62

Practically all of the deciduous fruits shipped to the East are sold on a delivered basis (R. 49). Fluctuations in the market prices during the season sometimes equal or exceed the freight rate (R. 24). In some instances during the last few years grapes have been left unpicked on the vines, or after arrival at Eastern points have been dumped in the sea because of the inability of the market to absorb the supply.

Rates.

The rates for the transportation of deciduous fruits are blanketed from all producing points in California to large destination groups in the east designated as groups A to M inclusive. Prior to 1911 the rates to the territory east of Chicago had varied between $1.40 and $1.50 per hundred pounds, being higher than the rates to Chicago and points west thereof, which after various fluctuations between $1.25 and $1.15 had become stabilized at $1.15. In 1911 the rates to points east of Chicago were voluntarily reduced to $1.15, then applicable at Chicago and points west. This rate continued in effect, as to the entire territory from

the Rocky Mountains to the Atlantic coast (except the Southeast) until it was raised to $1.44 by the Director General of Railroads, on June 25, 1918. The rate of $1.44 was extended to the Southeast in 1919. On August 26, 1920 the general increases authorized by the Commission resulted in rates of $1.80 to group J (Denver, Cheyenne and vicinity) and $1.92 to the remaining groups, including all points east of group J. On January 1, 1922 the rates were voluntarily reduced by the carriers to $1.62 to group J and $1.73 to the remaining more easterly groups, at which level they remained until ordered reduced in the proceeding now under review (R. 28).

The order of the Commission (R. 7) required that the rates be reduced as follows:

> The $1.73 rate applying to Groups A to M (except J) was reduced to $1.60, a reduction of 13¢ per 100 pounds.
>
> The $1.62 rate, applying to Group J, was reduced to $1.50, a reduction of 12¢ per 100 pounds.

The carriers were authorized in connection with the new rates, to increase the minimum carload weight on grapes from 26,000 pounds to 30,000 pounds, but the minimum on other deciduous fruits was not permitted to be increased (R. 59).

All parties to the proceeding before the Commission agreed that the blanket adjustment should be maintained and that the rates should be considered in view of the average weighted haul (R. 29). The movement to Group J is comparatively small, 627 cars out of

74,456 in 1926 (R. 19) and does not materially affect the average. The weighted average haul of all traffic moving under these rates in 1926 (including group J) was 2,970 miles, showing that nearly all the traffic finds its destination close to the Atlantic seaboard (R. 20).

The rates thus ordered to be reduced had been in effect since January 1, 1922, a period of six years, and more than 400,000 cars had moved under them.

Proceedings before the Commission and in court.

The earlier proceeding before the Commission.

The California Growers' & Shippers' Protective League is an association of growers and shippers of deciduous fruits, having its office at San Francisco. It was the complainant before the Commission in the proceeding in which the order of the Commission here complained of was made. It had also been the complainant in an earlier proceeding, challenging the same rates, which had been decided in favor of the carriers. On August 31, 1923, the Association filed a complaint (Docket No. 15137) alleging that the deciduous fruit rates were unreasonable and unduly prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act (R. 282). After hearing, the Commission, on June 25, 1925, dismissed that complaint, finding that the rates were not unreasonable or unduly prejudicial, and that the traffic was then freely moving in interstate commerce. The report of the Commission (100 I. C. C. 79) is printed on page 281 of the Record.

The report concludes (R. 317):

"* * * Considering the rates assailed as a whole, it does not appear that they are unreasonable. On the other hand, the comparisons with the rates from the Northwest and other producing sections indicate that the rates in issue are reasonable.

"We find that the rates assailed as a whole are not unreasonable or unduly prejudicial as alleged. This finding is without prejudice to any conclusion which may be reached upon the later and more comprehensive record concerning the relation of railroad rates to agriculture which is expected to be developed in Docket No. 17000.*

"An order will be entered dismissing the complaint."

Complainant's application for reconsideration was denied by the full Commission on March 2, 1926.

The present proceeding before the Commission.

Less than ten months after the termination of the first proceeding, the same complainant, California Growers' & Shippers' Protective League, on December 20, 1926, filed a new complaint with the Commission, (R. 139) again alleging that the rates were unreasonable and unduly prejudicial, and further specially alleging that the rates were higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service and were in violation of the Hoch-Smith Resolution. This is the pro-

*Docket 17000 referred to is the general rate investigation initiated by the Commission on its own motion for the purpose of giving effect to the Hoch-Smith Resolution. It is hereafter referred to and is not to be confused with the later proceeding before the Commission, instituted by the California Growers' & Shippers' Protective League, in which the order here complained of was made.

ceeding in which the order here complained of was made.

Various parties intervened, some favoring and others opposing the complaint. The Department of Agriculture and Markets of the State of New York (R. 148), the Department of Agriculture of Pennsylvania (R. 156), and the Department of Agriculture of Michigan (R. 161) intervened in opposition to the complaint. They alleged that deciduous fruits, principally grapes, produced in those states, were being marketed in active competition with the California products, that the producers thereof were suffering from a depression and were faced with the loss to California producers of their natural markets, and that any reduction in the California rates would greatly aggravate the seriousness of their situation. The Arkansas Railroad Commission and the Ozark Fruit Growers Association also intervened alleging that Arkansas growers market their products in the same destination territory and that any reduction in the rates on California fruits would jeopardize the interests of growers and shippers of deciduous fruits in Arkansas unless a similar reduction was made in the rates from Arkansas (R. 154).

After hearing, the Commission, on July 20, 1927, made its Report and Order (R. 16) prescribing the reduction in rates now in question.

It is the order entered upon this finding which the carriers here seek to annul.

The carriers immediately petitioned the Commission for reconsideration. On November 14, 1927, the

Commission reaffirmed its previous order and made a Report on Further Consideration (R. 65).

In the Report on Further Consideration, Commissioner Eastman who had filed a separate concurring opinion to the original report filed a dissenting opinion (R. 68).

Commissioner McManamy dissented in both reports.

The Proceeding in the District Court.

On November 23, 1927, the carriers filed their petition and bill for injunction in the United States District Court for the Northern District of California praying that the order be annulled and further praying that the Court issue a temporary injunction restraining the execution of the order, pending final hearing on the bill (R. 1). Answers were filed by the United States (R. 75), by the Interstate Commerce Commission (R. 79), and by the California Growers' & Shippers' Protective League, the complainant before the Commission (R. 83), which was permitted to intervene (R. 75).

The application for the temporary injunction was heard by Rudkin, Circuit Judge, and Kerrigan and St. Sure, District Judges, who, on January 18, 1928, entered an order denying the application for a temporary injunction (R. 101). *Ann Arbor R. Co. v. United States,* 30 Fed. (2d) 940.

The showing on the application for a temporary injunction consisted of the record before the Commission and affidavits indicating the movement of deciduous fruits under the rates in question.

On May 2, 1928, the case was submitted on its merits on the same record. On May 9, 1928, the Court entered its decree dismissing the bill for want of equity and denying an application for a stay pending an application to the Supreme Court of the United States for a stay pending appeal (R. 107). In dismissing the bill the Court filed a memorandum, which appears at page 105 of the Record herein.

The carriers immediately appealed to the United States Supreme Court from the final decree dismissing the bill, and an order allowing the appeal was entered on May 10, 1928 (R. 126). On May 21, 1928, the carriers applied to this Court for a stay pending appeal, but this application was denied on May 28, 1928.

The Hoch-Smith Resolution.

The Hoch-Smith Resolution (43 Stat. 801, 49 U. S. C. A. § 55) which forms the basis of the order of the Commission, is a joint resolution of the Senate and House, approved by the President on January 30, 1925.

It reads as follows:

> "Chap. 120.—Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.
>
> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which

at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantages as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

"In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

Specification of assigned errors intended to be urged, and summary of points upon which the carriers rely to show that the order is invalid.

The carriers contend:

1. The order is based on the Hoch-Smith Resolution which was misconstrued and misapplied by the Commission. The Commission construed the Resolution as requiring it to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful. This was a misconstruction of the Resolution. The Resolution required that the Commission reduce existing rates on agricultural products only if such rates were found to be unreasonable or discriminatory, or otherwise unlawful as measured by the provisions of the Interstate Commerce Act.

Assignment of Error No. X (R. 112). See also Assignments of Error Nos. IX, XI and XII (R. 111, 112).

2. If the Resolution, properly construed, authorizes the Commission to reduce existing reasonable rates, such reduction is only authorized where it is "compatible with the maintenance of adequate transportation service". The Commission has interpreted this to mean that a reasonable rate may be reduced, although the carriers are not earning the fair return specified pursuant to Section 15a of the Interstate Commerce Act. This is in effect to repeal Section 15a, and is an improper interpretation of the Resolution. If the Resolution authorizes the Commission to reduce a reasonable rate where the carriers are not earning a fair return, it also requires that other rates be adjusted simultaneously so that the carriers' revenue, already inadequate, will not be impaired further.

Assignment of Error No. XLII (R. 122). See also Assignments of Error No. XXIX (R. 118) and Nos. XLI and XLV (R. 122, 123).

3. The Commission erroneously construed the provision of the Resolution respecting "freedom of movement by common carriers of the products of agriculture affected by that depression" to mean that notwithstanding a long, steady and "enormous increase in the tonnage of such fruits" moving in interstate commerce, freedom of movement did not exist unless the shippers were making a profit.

Assignment of Error No. XXV (R. 116). See also Assignments of Error Nos. XXIV (R. 116) and XXXVI (R. 129).

4. The Commission erroneously construed the Resolution as authorizing it to find without substantial

evidence that the existing rate was unreasonable, and that the new rate was the lowest possible lawful rate, and further misconstrued the Resolution as placing upon the carriers the burden of proving that the old rate was the lowest possible lawful rate and that the new rate was lower than the lowest possible lawful rate. The order is arbitrary and invalid since the Resolution does not authorize the Commission to act without substantial evidence and does not alter the existing rule requiring the complainant to bear the burden of proof.

Assignments of Error Nos. XLVII and XLVIII (R. 124).

5. The Commission misconstrued the Resolution in that it held that a rate which yielded the carrier an amount but slightly above operating expenses was a lawful rate. The Interstate Commerce Act and the Constitution require that each rate shall yield to the carriers all proper costs and a substantial profit.

Assignment of Error No. XXXIII (R. 119). See also Assignments of Error Nos. XXXIV and XXXVII (R. 120, 121).

6. The Commission misconstrued the Resolution in that it applied it in an isolated proceeding involving a rate on a particular commodity from a single state, while the Resolution is intended to be applied only in a general investigation into the general rate structure of the country.

Assignment of Error No. XVIII (R. 114). See also Assignments of Error Nos. XVII and XIX (R. 114).

7. The Commission, in construing the Resolution as authorizing it to lower rates on deciduous fruits because the industry is in a depressed condition, has adopted a new and revolutionary policy in rate making, which is not justified by the provisions of the Resolution, and violates the settled rule of statutory construction that a statute will not be construed to bring about a complete revolution in legislative policy unless it contains clear and definite language demonstrating an intention to effect such result.

Assignment of Error No. XVI (R. 114).

8. The Resolution should, if possible, be interpreted in such a manner as will avoid doubts as to its constitutionality. If construed as authorizing and directing lower rates than would otherwise be prescribed solely because of a depression in a given industry and the inability of shippers to conduct their business at a profit, as was done by the Commission in this case, it would be unconstitutional; (1) as a deprivation of the use of private property transcending the power to regulate interstate commerce; and (2) as being a regulation of industry and not a regulation of commerce.

Assignment of Error No. XLIX (R. 124). See also Assignments of Error Nos. VIII (R. 111), XIII and XV (R. 113), XXXVIII and XL (R. 121), XLVI (R. 123) and LII (R. 125).

9. The rate fixed is confiscatory and violates the Act and the Constitution. The Commission intended to fix a rate that would not yield a substantial profit

and did in fact fix a rate which does not cover the carriers' costs or yield a substantial return.

Assignment of Error No. II (R. 110). See also Assignments of Error Nos. III, IV, V and VI (R. 110) and XXI and XXII (R. 115).

ARGUMENT.

The order is based upon the Hoch-Smith Resolution.

The order of the Commission reducing the rates followed its written report in which it stated the issues, discussed the law applicable, reviewed the evidence and made findings of fact. The report is referred to in, and made a part of, the order, and is therefore available in determining the foundation of the order, the facts upon which the Commission acted and based its decision, and the interpretation which it placed upon the law which it considered applicable.

An examination of the Report (R. 16) and the Report on Further Consideration (R. 65) makes clear that the order is founded on the Hoch-Smith Resolution, and that the finding in the report (R. 59)——

> "That the rate of $1.73 * * * is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; * * * and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture."

is not based, and was not intended by the Commission to be based upon the provisions of Section 1 of the Interstate Commerce Act, which require that rates be just and reasonable, but is based upon a supposed mandate contained in the Resolution:

> "In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The proceeding before the Commission was not the ordinary one to enforce the reduction of an "unreasonable" rate, violating Section 1 of the Act. It was intended, and was considered by the Commission, to be one to enforce "the lowest possible lawful rates compatible with the maintenance of adequate transportation service", enjoined by the Resolution, irrespective of whether the existing rate was reasonable or not. It is submitted therefore that the statement that the existing rate was unreasonable should not be considered as an independent finding that the rate was unreasonable but only as a finding that the old rate was in excess of "the lowest possible lawful rate" enjoined by the Resolution as interpreted by the Commission.

1. Complainant relied upon the Hoch-Smith Resolution.

After the formal allegations in paragraphs I to IV as to the corporate existence of the defendants and

reference to the tariffs containing the rates attacked, every paragraph of the complaint specifically refers to the Resolution (R. 145, 146). Paragraph VIII (R. 146) summarizes the complainant's allegations and charges that the rates then in effect were:

> "(1) unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, as amended, and
>
> (2) unduly and unreasonably prejudicial, in violation of Section 3 of said Act, and
>
> (3) higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and upon an unjust and unreasonable basis with relation to other rates, in violation of the joint resolution of Congress (S. J. Res. 107) commonly known and designated as the Hoch-Smith Resolution."

It will be noted that whenever the Resolution is referred to in the complaint before the Commission it is referred to in the conjunctive with the allegation that the rates are unreasonable. It was patently invoked by complainant before the Commission as affording a ground for relief independent of that given by the Interstate Commerce Act.

In paragraph IX (R. 146-7) complainant states that it brings its complaint "at this time to the end that relief may expeditiously be afforded in pursuance of said resolution". The concluding paragraph X, (R. 147) requests a departure from the Commission's usual procedure so that "final submission and disposition of said issues be accomplished at the earliest practicable date", and the prayer (R. 148) asks an order requiring defendants to "cease and desist from

the aforesaid violation of said Act and of said Resolution", and asks that they be required to establish rates that will "promote freedom of movement of said fruits at the lowest possible lawful rates".

The complaint was filed with the Commission on December 20, 1926, less than ten months after the full Commission had denied a petition for reconsideration in the earlier case where the Commission found the identical rates (R. 317) were "not unreasonable or unduly prejudicial as alleged" (R. 18).

The report of the Commission in its opening paragraph states that "the complaint also alleges that these rates are higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service and that they are on an unjust and unreasonable basis with relation to other rates, in violation of the so-called Hoch-Smith Resolution" (R. 17). It refers to the resolution as being "*primarily* relied upon in the instant case" (R. 18).

2. The evidence was directed to the Hoch-Smith Resolution.

The evidence introduced before the Commission was directed to the issues suggested by the Resolution. The report of the Commission summarizes this evidence. It points out that the complainant developed at length the trend of agriculture in California, showing that during the past thirty years much land formerly used for other purposes had been diverted to the growing of fruits and vegetables and that, should the growing of deciduous fruits become unprofitable, much of the land would go back to its native state (R. 21).

It is pointed out further that the prices of deciduous fruits had decreased so that transportation charges had become an important item of expense, and "in complainant's view the markets must be brought nearer by means of rate reductions" (R. 22). The farm values for deciduous fruits over a period of years are then reviewed and the Commission finds, "There has been since 1921 a distinct downward trend in the price levels of deciduous fruits in contrast with the upward trend of prices in the citrus-fruit industry, and in contrast with the comparative stability of the vegetable prices" (R. 22). This evidence and these findings are solely responsive to the Resolution. The Commission discussed the showing with reference to the lower prices received for deciduous fruit and states:

> "These prices are shown to us in compliance with the terms of the Hoch-Smith resolution, and to meet the statement in the prior report of our division, that 'the record herein does not show the comparative levels in market value of the various commodities over a reasonable period of years'." (R. 23)

The Commission devotes much attention to the prices received by the shippers and to the condition of the industry. It finds that "While undoubtedly overproduction and distributing practices are factors in the situation, the *essential* fact still remains that the industry is in serious financial straits" (R. 25) and that "complainant has established that this industry, for the past five years, has been undergoing a period of deflation and depression, and that the

years 1925 and 1926 were more unfavorable than the years preceding". It states, "In complainant's view the existing depression in California deciduous-fruit industry is precisely such as the Hoch-Smith resolution was designed to assist" (R. 25).

3. The Commission considered the evidence and issues from the standpoint of the Hoch-Smith Resolution.

The Commission distinguishes other cases before it, which had been cited in support of the carriers' contention that the rates were reasonable, by saying that "Moreover, the case was decided prior to the passage of the Hoch-Smith Resolution" (R. 41), and that "They would not necessarily constitute precedents against the granting of relief if the same rates were assailed with an adequate showing of changed and different conditions of fact, or in the basic law applicable, and do not preclude our conclusion on this record" (R. 41). The statement respecting a change "in the basic law applicable" is indicative of the Commission's view that the Resolution constituted such a change.

The contention of the carriers that a comparison with the rates on California citrus fruits which the Commission considered "at least not too high" (R. 42) showed that the deciduous fruit rates were reasonable and thus could not be reduced, was dismissed by the Commission with the statement, "But it does not follow that the earnings on citrus-fruit traffic will prevent any readjustment of the deciduous-fruit rates if present rates on the latter are not the lowest possible lawful rates compatible with the maintenance

of adequate transportation service. Under the Hoch-Smith resolution the relative prosperity of an industry over a period of years may be considered as well as its relative adversity" (R. 42).

The Commission discusses at length the meaning of the expression, "freedom of movement", as used in the Resolution. The contention of the carriers, "that the charges for transportation have nothing to do with the existing economic conditions in the deciduous fruit industry" (R. 48), and that the rapid increase in the quantities shipped indicates that there is "now entire freedom of movement" is contrasted with the view of the shippers that freedom of movement, "as used in the Hoch-Smith Resolution means more than the hauling of an unprecedented volume of traffic". The Commission finds that "the record establishes that producers are sustaining serious financial loss, that their indebtedness is increasing, that they are finding it difficult to meet taxes, that banks are foreclosing or assuming the management of properties, and that land values have been entirely deflated. Under such conditions complainant contends that freedom of movement does not exist" (R. 48).

The Commission considered the effect of the proposed reduction on the industry and found that, "It is impossible to prophesy with assurance what result would flow from a reduction in rates" (R. 49), but that, "Since practically all deciduous fruits are sold on a delivered basis, complainant claims that a reduction in rates will prove of direct benefit to the producer" (R. 49). It also found, "Assuming that

the reduced rate would not be reflected in reduced selling prices, the reduction here sought * * * would afford substantial relief to the growers, who bear probably the major portion of the charges directly or indirectly, and would mean the difference between a loss and a small profit to many of them" (R. 49). It is reasonable to conclude that the Commission proceeded to make its order upon this assumption.

Much space is devoted to a discussion of the evidence as to the condition of the carriers and their relative prosperity (R. 49-53), upon which the Commission apparently based its finding that the rates requested would be "compatible with the maintenance of adequate transportation service" as required by the Resolution (R. 56).

4. The Commission based its report and order on the Hoch-Smith Resolution.

After describing the parties to the proceeding and the nature of the traffic involved, the report proceeds at once to discuss the economic showing made by complainant "in order that the present situation of the deciduous fruit industry might be viewed in its proper perspective" (R. 21). It discusses the evidence as to the economic condition of the fruit industry and its causes and says,

> "While undoubtedly overproduction and distributing practices are factors in the situation the *essential* fact still remains that the industry is in serious financial straits." (R. 25)

The Commission finds that

> "Complainant has established that this industry, for the past five years, has been undergoing a period of deflation and depression" (R. 25)

and summarizes the divergent views of the complainant and defendants as follows (R. 25):

> "In complainant's view the existing depression in the California deciduous-fruit industry is precisely such as the Hoch-Smith resolution was designed to assist. It contends that a rate reduction will tend to foster and preserve that industry and that this result will be in the interest of a natural and proper development of the country as a whole. Defendants, on the other hand, claim that if they have justified their present rates under sections 1 and 3 of the interstate commerce act, nothing either in the Hoch-Smith resolution, or developed of record in the instant case, will provide lawful warrant for us to reduce such rates."

After thus setting forth the contentions of the parties as to the proper interpretation and application of the Resolution, the Commission proceeds itself to discuss and interpret the Resolution. This it does in the following language (R. 26):

> "In two recent cases we have had occasion to discuss the meaning and intent of the Hoch-Smith resolution. In *Grain and Grain Products,* 122 I. C. C. 235, 264, we said:
>
> 'As aforesaid, the intent of the resolution is that products of agriculture affected by depression shall move at the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." It sets no new standard of lawfulness, but provides, in effect, that to the

extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry. v. North Dakota,* 236 U. S. 585; *Norfolk & Western Ry. v. West Virginia,* 236 U. S. 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service, in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be "compatible with the maintenance of adequate transportation service." '

"Subsequently, in connection with similar language in *American Live Stock Asso. v. A. T. & S. F.,* 122 I. C. C. 609, 617, we further said:

'In the past we have had occasion to consider at times what may be called "out-of-pocket" cost, but while it has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit. * * * We say "in principle", because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by

comparison with other rates. Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation.'

"The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. In the *Western Rate Advance Case,* 20 I. C. C. 307, pages 347, 348, we said:

'What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined—in fact has been created—to repress its upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service.'

"Both the commission and the courts have repeatedly referred to a flexible limit of judgment in reaching a conclusion as to the reasonableness of a rate or a schedule of rates. Otherwise stated,

there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services.

"We again conclude that 'the lowest possible lawful rates' which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service."

This, viewed in the light of the other statements in the report, indicates with considerable exactness just what the Commission considered it was under the duty to do in applying the Resolution, and makes clear also that the Commission based its order solely upon what it deemed to be the proper interpretation and application of the Resolution.

This discussion shows that the Commission considered that the Resolution imposed upon it the duty to fix rates for the carriage of agricultural products suffering from depression at the lowest limit or level within what it called "the zone of reasonableness permitted by the flexible limits of discretion reposed in" it, and "as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service" (R. 28). The Commission deemed itself under the duty to reduce a rate on agricultural products suffering from depression, if that rate, even though reasonable, was higher than

the "lowest possible lawful rate", which, as the Commission later stated, was a rate slightly in excess of operating expenses (R. 67).

As the order was based upon the supposed mandate of the Resolution, the finding that the old rate was "unreasonable" was not a finding that the old rate was unreasonable, measured by the standards of the Interstate Commerce Act, but only that it was in excess of the "lowest possible lawful rate" enjoined by the Resolution. This is established by the portions of the report already noted and the further statements to which we will now refer.

In the report the Commission finds (R. 56):

> "Complainant has established that the growing of deciduous fruits is one of the great basic industries of California, and that this industry for the past five years has undergone a period of deflation and depression. Its economic situation is such that it clearly comes within the terms of the Hoch-Smith resolution as entitled to the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

This language is solely responsive to the Resolution.

The Commission further finds (R. 56):

> "While all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

This is intended to be responsive to another of the requirements of the Resolution, namely, that the rate

to be fixed shall be "compatible with the maintenance of adequate transportation service".

But any doubt that might exist on the question would seem to be dispelled by the Commission's own statement of the issue in the case (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us."

This is the issue which the Commission itself stated was the "primary issue". It is the issue which the Commission decided. It did not decide or consider any other issue. As framed by the Commission, the issue is not whether the existing rate is reasonable, but is "whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us"; whether the existing rate is the "lowest possible lawful rate", defined by the Commission to be, in principle, a rate yielding at least some margin of profit and, in practice, slightly in excess of operating expenses.

In its endeavor to justify the reversal of its earlier decision finding these rates not unreasonable, rendered less than two years before, in a proceeding between the same parties, the Commission summarized the changes in conditions which had occurred as follows (R. 57):

> "1. The Hoch-Smith resolution was approved subsequent to the presentation of the prior case.
> 2. The depression in the deciduous fruit industry has continued unabated for a further

period of three years and conditions in 1926 were worse than in 1923. In the former decision our division found that the record did not justify the conclusion that the unfavorable financial conditions were likely to continue.

3. The present economic showing is fully responsive to the terms of the resolution. In the prior case the comparative levels in market values over a reasonable period of years were not shown.

4. Complainant offers to submit the deciduous-fruit industry to an increase in the carload minimum on grapes from 26,000 pounds to 30,000 pounds.

5. There has been a further increase in the volume of movement from a total of 69,777 cars in 1923 to 86,795 cars in 1925 and 78,803 cars in 1926.

6. The financial condition of the carriers principally concerned has further improved.

7. Complainant has submitted a more comprehensive rate showing.

8. The average weight of the paying load of deciduous fruit has dropped from 31,460 pounds in 1922 to 28,306 pounds in 1926.

9. There has been an increase in the weighted-average haul shown as 2,965 miles for grapes and 2,909 miles for all deciduous fruits except apples, in the prior case 3,000 miles for grapes and 2,970 miles for all deciduous fruits except apples in 1926. Otherwise stated, in 1926, there was 61 miles of additional service for each ton of fruit handled."

Of these differences the first three, as well as the sixth, exclusively relate to the Resolution. The fourth and fifth which superficially favor complainant are balanced by the eighth and ninth which favor the car-

riers. The seventh of itself is inconclusive (*Louisville & Nashville R. Co. v. United States,* 238 U. S. 1), so it is apparent that the controlling element of the case is the Resolution.

The ultimate finding of the Commission is on the primary issue as framed by the Commission. That finding is as follows (R. 58):

> "Considering the relative rates on and earnings of the deciduous fruit traffic in the light of the condition of the industry and of the service performed by the carriers, and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

This finding falls squarely within the Resolution. The reference to "the lowest possible lawful rates as herein defined" is clearly an allusion to the Commission's definition of such a rate as one which in principle must be high enough to cover the cost plus at least some margin of profit (R. 26).

The conclusion of the Commission (R. 59):

> "We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M, inclusive, except Group J is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 and that such rates are the lowest possible lawful rates compatible with the maintenance of ade-

> quate transportation service, and are necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture"

is expressed in almost the exact language of the Resolution. The expression that the existing rate is "unreasonable" is obviously a finding that it is unreasonable judged by the standards of the Resolution, as interpreted by the Commission. It is a finding that the rate then prevailing is in excess of the "lowest possible lawful rate", and is clearly not a finding that the rate is unreasonable measured by the ordinary standards prescribed by Section 1 of the Act. That this interpretation of the finding is correct is supported by the separate concurring opinions of Commissioners Woodlock, Taylor and Eastman, and the dissenting opinion of Commissioner McManamy; it is also supported by the Report on Further Consideration.

The report states that four of the eleven Commissioners did not participate in the disposition of the case (R. 65). This means that seven did participate, and the affirmative vote of four was necessary to the order. Commissioner McManamy dissented. Commissioner Woodlock, joined by Commissioner Taylor filed a separate concurring opinion, and Commissioner Eastman filed a separate concurring opinion. Two other commissioners therefore joined with Commissioner Aitchison in the principal report. The vote of one of the Commissioners filing a separate concurring opinion was necessary to the validity of the order.

Commissioner Eastman, in his concurring opinion, states (R. 59):

> "While it is by no means clear that the rates in issue are unreasonable and ought to be reduced, complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt, and I can for that reason accept the results reached."

We will later point out that Commissioner Eastman changed from an assenting to a dissenting opinion in the report on further consideration.

Commissioner Woodlock (with whom Commissioner Taylor concurred) in his separate concurring opinion said (R. 60):

> "The Hoch-Smith resolution (which governs the disposition of this case) contains other injunctions addressed to us besides that which requires the lowest possible lawful rate on products of agriculture suffering from depression."

Commissioner McManamy, dissenting, said (R. 63):

> "The majority report as well as the concurring expressions show that the decision is predicated upon the Hoch-Smith Resolution."

It is permissible to refer to separate concurring or dissenting opinions in interpreting a report of the Commission. *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U. S. 433; *St. Louis & O'Fallon Ry. Co. v. United States,* (May 20, 1929) 73 L. ed. 457.

In the Report on Further Consideration, the Commission, after admitting an error of $20.79 per car in its previous computation of the cost of carriage, and,

having already prescribed what it considered the lowest possible lawful rates, concludes (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

It is apparent from the entire report that the conclusion of the Commission was directed solely to the issue framed and specifically stated by the Commission (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us."

The conclusion that the old rates were "unreasonable" reflected merely the following analysis of what it considered were the essential features of the case:

(a) The California deciduous fruit industry is in a state of depression;

(b) Reduced rates are necessary to permit the movement of deciduous fruit freely at a profit to the shipper;

(c) Under such conditions the Resolution requires that rates be fixed at the lowest extremity of the zone of reasonableness;

(d) The existing rates are in excess of the lowest limit of the zone of reasonableness, and

(e) New rates are therefore prescribed which are at the lowest limit of the zone of reasonableness. These rates will afford the carriers a revenue slightly in excess of operating expenses, and although probably of less than average profitableness, will leave the traffic attractive to the carriers (R. 67).

This conclusion is responsive only to the Resolution as construed by the Commission.

5. The old rates are not found to be unreasonable under the Act.

It will no doubt be urged that the expression in the Report "the rate of $1.73 * * * is and for the future will be unreasonable to the extent that it exceeds or will exceed $1.60" is a finding that the rate is unreasonable *per se,* under section 1 of the Act, and without reference to the Resolution. It is submitted that this expression, couched in the usual formal language of the Commission, cannot acquire a meaning never intended by the Commisson by being lifted out of its context and segregated from the remainder of the report. It must be read with the rest of the report and interpreted in the light of the context. The important question is not what the Commission said, but what it did and what power it attempted to exercise. The question here before the court can best be put in the words of Chief Justice White in *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U. S. 433, at page 437.

"When that which is superfluous is put out of view, it will come to pass that every substantial

> controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question."

No magic or infallibility attaches to the word "unreasonable" contained in the reports of the Commission. The use of this expression does not conclusively determine the nature and character of the order of the Commission or the grounds on which it is based. To answer that question the entire report must be examined and the substance rather than the mere form, the true intent and not the formal symbols used, will determine the nature of the power which the Commission attempted to exert.

In *Southern Pacific Co. v. Interstate Commerce Commission,* supra, the court was reviewing an order of the Commission (14 I. C. C. 61) entered upon a Complaint which charged that an increased rate on lumber "was unreasonable in and of itself and discriminatory". The Commission found "* * * the present rate * * * is unjust and unreasonable". The court concluded that this finding was not to be considered as an independent finding that the rate was in fact unreasonable measured by the statute, saying (219 U. S. at p. 449),

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned,

we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

Again, in the *Passenger Scrip Case* (*United States v. New York Central R. R. Co.*, 263 U. S. 603) the court reviewed an order of the Commission requiring the railroads to issue interchangeable scrip tickets at a reduction of 20% from the standard fares. This order was issued by the Commission following the 1922 amendment of Section 22 of the Act, which directed the Commission to require the issuance of such tickets.

In instituting its proceeding of investigation following the passage of the statute the Commission stated in a notice of hearing that evidence was desired upon the following questions:

"* * * (2) What rate or rates shall be established as just and reasonable for each or either form of ticket? * * *" (77 I. C. C. 201).

It further stated

> "The amount of the rate is the most important question before us" (203)

and after concluding that

> "The spirit and apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare * * *" (209)

made the following finding:

> "We further find that the rates resulting from that reduction will be just and reasonable for this class of travel * * *" (210).

In holding the order void Mr. Justice Holmes, speaking for the entire court, said (263 U. S. 609):

> "It is further alleged in the bill that the conclusion stated by the Commission, that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel, is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law."

Upon review of the entire report the court found that the Commission had not attempted to reach an independent conclusion on the evidence before it as to what rates would be just and reasonable, but that its action was based wholly upon the supposed wish of Congress that these tickets should be sold at reduced rates, saying (p. 611):

> "It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress."

In this case also it is plain that the expression that the existing rates were unreasonable was not based on independent grounds but solely upon the supposed mandate of the Resolution.

In *Anchor Coal Co. v. United States,* 25 Fed. (2d) 462, the order of the Commission made in *Lake Cargo Coal,* 139 I. C. C. 367, was under review. In that case the report had been amended to include a finding that the rates were "unjust and unreasonable" (25 Fed. (2d) 470). But the special court says (p. 464):

> "To understand, however, exactly what the power is which the Commission has assumed to exercise, it is necessary that we go behind its merely formal conclusions that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions (citing cases). And, in the performance of this duty, it is necessary that we analyze not only the report of the Commission accompanying the order whose enforcement we are asked to enjoin, but also the reports made in 1925 and 1927 with regard to the reductions of rates from the northern field, in the latter of which the differential was increased from 25 to 45 cents."

The court there felt that a complete inquiry into the power which the Commission assumed to exercise required an examination of the group of decisions making up the whole story. Here we feel it is equally appropriate, in order to ascertain exactly what the Commission was doing, to examine not only its two reports in docket No. 19130 (129 I. C. C. 25; 132 I. C. C. 582) but also its report in docket 15137 (100 I. C. C. 79).

In *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*, 190 Fed. 591, the order under review was found to be based on commercial conditions and beyond the jurisdiction of the Commission, notwithstanding a finding (19 I. C. C. 148) that "* * * upon full consideration we are of the opinion that the present lemon rate * * * is unreasonable."

Other cases laying down the same principle are:

Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197;

Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 Fed. 449.

In support of the contention that the statement (R. 59) "We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 * * * is and for the future will be unreasonable to the extent that it exceeds or will exceed $1.60" is a finding of unreasonableness of the old rates charged, solely by the standards of the act, Appellees will no doubt point to the mass of evidence introduced before the Commission, which was of a kind ordinarily considered in rate cases. The bulk of this evidence may be contrasted to that dealing with strictly commercial conditions, the number of pages of testimony and the exhibits devoted to each kind of evidence may be counted as well as the pages of the report devoted to a discussion thereof, and the contention made that this was but a conventional rate case; that the Commission had ample evidence before it upon which to base a finding that the old rates were unreasonable under Section 1 of the Act, and that the new rates were prescribed as reasonable rates for the future.

The nature of this evidence is discussed in more detail in connection with the section of this brief dealing with the errors of the Commission in imposing upon the carriers the burden of proof and acting without substantial evidence to support its finding that the rates prescribed were the lowest possible lawful rates (infra pp. 108-122).

The quantity of evidence introduced does not prove that the Commission proceeded in accordance with law, or that its order is valid, or that such evidence was deemed by Commission as sufficient to justify a finding that the rates were unreasonable measured by the standard of Section 1.

What use did the Commission make of the evidence? For what purpose did it weigh it? What were its conclusions based upon it? The record is clear on these points.

The Commission considered the evidence only for the purpose of determining whether the existing rate was "the lowest possible lawful rate" under the Resolution, and for no other purpose. This is clear from the statement in the Report (R. 56):

> "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us",

and by the ultimate finding (R. 58):

> "* * * we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

If the primary issue, in the view of the Commission, was whether the rates were "the lowest possible lawful rates" and not whether they were reasonable or unreasonable, it is obvious that the evidence was considered and viewed with the single object of reaching a determination of that issue. It is idle to speculate as to what the view of the Commission would have been had it properly pursued the law and considered the evidence from the standpoint of the reasonableness of the existing rate. That issue was not considered by the Commission, and the fact that there was evidence that might have been used for this purpose may point to a lost opportunity, but it certainly is no proof that it was used for that purpose.

To contend that there was an abundance of evidence upon which the Commission could have found the rate unreasonable under Section 1 is futile. The fact is that the Commission did not consider that to be the issue, and confined itself to the single issue as to whether the existing rate was in excess of "the lowest possible lawful rate". What it would have done had it correctly interpreted and applied the law, is a matter of speculation, into the realms of which this court cannot enter for it may not substitute its judgment or discretion for that of the Commission. The order is void because the Commission applied the wrong legal measure.

6. Subsequent references to the Report show that it was based on the Resolution.

The Commission itself has frequently referred to this case (129 I. C. C. 25; 132 I. C. C. 582) as being one wherein the Resolution was applied.

In its 41st Annual Report to Congress, at page 67, it said "In three important cases during the past year we have had occasion to construe the Hoch-Smith resolution * * *" and quoted from its Report (129 I. C. C. 25, 32).

In *Boston Wool Trade Association v. Apache Ry. Co.*, 144 I. C. C. 111, 114, it is said:

> "To this mandate of Congress we have in several cases given such effect as we could in respect of important commodities," citing the report in this case.

In *Chautauqua & Erie Grape Growers' Assn. v. Erie R. R. Co.*, 146 I. C. C. 403, 410, it is said:

> "In both the *Georgia case* and the *California case* we specifically stated that the rates were prescribed in accordance with the provisions of the Hoch-Smith resolution."

The decision herein is likewise cited by the Commission, as being a case wherein the Resolution was applied, in

Georgia Peach Growers Exch. v. A. G. S. R. Co., 139 I. C. C. 143; 148 I. C. C. 755;

Lake Cargo Coal, 139 I. C. C. 367, 394.

Members of the Commission during the course of various congressional inquiries have referred to this proceeding. When hearings were being held by the

House Committee on the Appropriation Bill for 1930, Commissioner Eastman referred to this case (Record of Hearing, pp. 182-183).

"Mr. EASTMAN: In the first place, I think that I ought to say that the Hoch-Smith Resolution has had some positive results in addition to the hearings in these investigations.

Mr. SUMMERS: In the southeastern part of the country, and also in the southwestern part of the United States.

Mr. EASTMAN: And also on the Pacific Coast, in the reduction of rates on deciduous fruits, for example. The carriers, by the way, carried that case to the courts, and they are attempting to secure an interpretation of the Hoch-Smith Resolution through the medium of that case, but those reduced rates have gone into effect."

7. Summary.

The complaint was based upon the Resolution. The Commission construed the complaint as relying principally upon the Resolution. The evidence was directed to the issues under the Resolution. The report shows on its face that it was based on the Resolution and the report has, since its rendition, frequently been referred to as being an application of the Resolution. In the words of counsel for the United States at the hearing in the District Court "The Hoch-Smith resolution is in the case from beginning to end".

The true meaning and proper interpretation of the Resolution.

In view of the interpretation placed upon the Resolution by the Commission and its application in this proceeding, it is important to determine just what the

Resolution directs and the true meaning of the enactment.

In aid of the interpretation of ambiguous language in a statute the reports of Congressional Committees and the statements of those in charge of the bill may be considered and the circumstances leading up to the enactment may likewise be considered in confirmation of the meaning of the words used.

United States v. Missouri Pacific R. R. Co., (January 2, 1929) 73 L. ed. 136, 139.

Legislative history of the Hoch-Smith Resolution.

On March 28, 1924, Senator Smith introduced Senate Joint Resolution No. 107, which in a single paragraph declared agriculture to be "the basic industry of the country" and directed the Commission "to effect such changes in the general rate structure of the country as will promote the freedom of movement" of such products *"at the lowest possible rates"*. It was referred to the Committee on Interstate Commerce and reported favorably on the same day with amendments. Before consideration by the Senate however it was again amended, Senator Cummins collaborating in the preparation of the amended form of the Resolution. As so amended and passed by the Senate it consisted of two paragraphs, the first of which declared the true policy of rate making to be that conditions existing in the various industries should be considered, so far as lawfully possible, to the end that commodities may freely move "with fair profit to the producer and sold at a reasonable price

to the consumer". The second paragraph of the Resolution as passed by the Senate declared that agriculture was the basic industry of the country and that it was the policy of Congress to foster that industry. It directed such lawful changes in the rate structure as will promote the freedom of movement of such products at the lowest possible lawful rates compatible with the maintenance of adequate transportation service (65 Cong. Rec. 8336).

The direction contained in the original form of the Resolution that the rates to be made for agricultural products be "the lowest possible rates" was changed to the "lowest possible *lawful* rates compatible with the maintenance of adequate transportation service".

During the consideration of this Bill by the Senate, Senator Smith and Senator Cummins, the authors of the amended resolution, explained its meaning, and in this connection Senator Smith stated as follows:

> "Permit me to state to the Senator that really there is no new proposition involved in it. It is simply a direction to the Interstate Commerce Commission that whenever there is a depression in any of the basic industries of the United States, as there has been in agriculture, the commission should take cognizance thereof, and regulate the rates so as to facilitate the movement of the products of that industry." (65 Cong. Rec. 8336).

In response to a question regarding the meaning of the resolution, Senator Cummins, said:

> "Undoubtedly the Interstate Commerce Commission has complete and adequate power to reduce freight rates in exact accordance with the

declaration made by this Joint Resolution, and while the Interstate Commerce Commission has, since the 1st of September, 1920, reduced rates upon agricultural products very markedly, yet I think it is wise again to call the attention of the Commission and of the country to the principle which should underlie rate making in basic commodities." (65 Cong. Rec., 8337.)

Prior to the introduction of this resolution in the Senate, Representative Hoch, on December 17, 1923, had introduced in the House of Representatives a joint resolution known as House Joint Resolution No. 94 (65 Cong. Rec., 345-6), directing the Interstate Commerce Commission to take action relative to adjustments in the railroad freight structure and the fixing of rates and charges. On January 16, 1924, Representative Hoch introduced a similar resolution known as House Joint Resolution No. 141 (65 Cong. Rec., 1070-1), directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers. The House Committee on Interstate and Foreign Commerce reported favorably on this resolution on May 13, 1924 (65 Cong. Rec., 8496-7). Senate Joint Resolution No. 107 having been passed by the Senate on May 12, 1924, was referred to the House Committee on Interstate and Foreign Commerce. On May 27, 1924, this Committee reported Senate Joint Resolution No. 107 to the House with amendments (65 Cong. Rec., 9675).

The Resolution as so reported contained two paragraphs. The first stated the substance of House Joint

Resolution No. 141 and directed a general investigation of the rate structure in the same language as contained in the second paragraph of the Resolution as enacted. The second paragraph (taken from Senate Joint Resolution No. 107) directed the Commission to effect with the least practicable delay such "reasonable and lawful changes" in the rate structure as would promote freedom of movement by common carriers of the products of agriculture affected by depression "at the lowest possible *reasonable and lawful rates* compatible with the maintenance of adequate transportation service."

The second paragraph was referred to in the report of the Committee in these words:

> "This direction to the Commission involves no purpose to do injury to the carriers, but expresses the will of Congress that in this time of agricultural depression the basic industry of agriculture shall be given with the very least possible delay every consideration in the matter of rates consistent with the maintenance of adequate transportation service."

The report then discussed the paragraph dealing with the general investigation of rates as follows:

> "This resolution is based upon the proposition that the present freight structure is out of adjustment, and that certain commodities, particularly agricultural products, are, in general, bearing an unfair proportion of the freight burden.
>
> "The resolution does not propose that Congress enter upon the technical job of rate making, but directs the Interstate Commerce Commission to proceed upon the inquiry and to remove as far

as possible the injustices and maladjustments that now exist. * * *

"The present freight structure, which has grown up piecemeal and is a result of all sorts of local considerations, has long been out of adjustment. This maladjustment has been greatly increased by the flat, horizontal percentage increases in freight rates which have been made in recent years. These flat, horizontal increases were not scientific. The method used was grounded on expediency and the need for prompt action. * * *

"This improper distribution of the freight burden has borne particularly heavily on the products of the farm owing to the price deflation in those products. The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of the service to the carriers is not the only factor that must be considered but the value of the service to the shipper as well. * * *

"A year ago the United States Chamber of Commerce named a special committee to make a study of this question, and on November 14, 1923, that committee made its report. On that committee were railroad traffic managers and other officials of the carriers and prominent business men of the country. In its report that committee said:

> "'It cannot be claimed that the railroad freight rate structure of the United States has ever been organized on a scientific basis, or that it has ever been systematically revised with the purpose of eliminating disparities. The great economic changes incident to and resulting from the war have created additional disparities resulting from horizontal rate changes, from the dislocation of relative price levels, and from increases in labor costs and terminal expenses which have borne with

greater weight on some classes of traffic than others. This situation renders a readjustment of relative freight rates of great immediate importance.'

"In his message to Congress in December, President Coolidge uttered this terse but comprehensive statement:

"'Competent authorities agree that an entire reorganization of the rate structure for freight is necessary. This should be ordered at once by Congress'." (Report No. 867, House Committee on Interstate and Foreign Commerce, May 27, 1924.)

The resolution as it then existed did not differ substantially from the form ultimately adopted. The real purpose and effect was explained by Representative Hoch in the following language:

"* * * The first part of this resolution proposes a general survey by the Interstate Commerce Commission of the freight structure of the country, and directs that such injustices and inequalities as found existing shall be corrected by the Commission. It also directs the Commission to take into consideration, among other things, the relation in prices of various classes and kinds of commodities as indicated over a reasonable average of years, and also does one or two other things which I will refer to later. * * *

"The first paragraph of this resolution is in exact compliance with that recommendation, and proposes not that Congress shall make rates, for obviously Congress cannot take upon itself that technical duty but directs the Interstate Commerce Commission to enter upon a comprehensive study and survey of the freight structure and to remove disparities and inequalities, as far as pos-

sible, without injuring adequate transportation service.

"* * * The second paragraph of this resolution is taken in substance from the Senate resolution. It makes special reference to agricultural products, including livestock. I want you to notice closely in order that there may be no misapprehension about it. I do not claim that this is any panacea or anything of that sort. It does not direct particular rates upon farm products, although I am firmly convinced that a study will show that those rates in many cases ought to be reduced, but it does call the attention of the Interstate Commerce Commission by the Congress, which has the right to speak to the Commission, which is an agency of the Congress, to the great agricultural depression existing in the country and it says to the Interstate Commerce Commission:

> "'We direct that you shall with the least practicable delay make such changes in the freight rates upon farm products, including livestock, as will as far as possible correct any injustices that may be found to exist and promote the freedom of the movement of these products.'

But, as gentlemen will notice by reading the Resolution, it does not contemplate that there shall be anything ruthless done; in fact, it specifically provides that it shall not interfere with the maintenance of an adequate transportation service. * * *" (65 Cong. Rec., 11019.)

During the debate on the Resolution Representative Shallenberger charged that no new power was given the Commission and that "this legislation is simply a gesture to placate the farmer." He further stated that the only way to relieve the farmer was by

the repeal of section 15a of the Act (65 Cong. Rec., 11020).

Representative Hoch at the close of the debate, summarized the purpose and effect of the Resolution, as follows:

> "The second paragraph is an honest direction to the Commission calling attention to the agricultural depression and directing every possible relief, reasonable and lawful, at the earliest practicable date. * * * But certainly every one knows that there are adjustments that should be made, and this Resolution provides that within reason and within the law wherever they can possibly find any adjustments that will not work injury to adequate transportation service and are in the interests of agriculture, including livestock, they shall make them; and I understand the only objection so far offered, outside of the objections of the gentleman from Alabama, by any one here, is that they are afraid that the Republican Party might possibly get a little credit for the passage of this resolution." (65 Cong. Rec., 11026.)

The Senate and the House having disagreed upon the final form of the Resolution, a Conference Committee was appointed which agreed upon the bill in its final form. As finally passed the Resolution contained three paragraphs. The first paragraph was taken from the Resolution as passed by the Senate, but the Conference Committee and Congress struck out the last clause of the paragraph, which provided that commodities should freely move "with fair profit to the producer and sold at a reasonable price to the consumer".

The second paragraph of the Resolution as reported by the Conference Committee was unchanged from the form in which adopted by the House. The third paragraph contained the substance of the original Senate resolution, as modified in the House, changed only to the extent stated by Representative Hoch, when he said:

> "The only change from the House resolution is in the latter part of the Resolution, where the Commission is directed to make such 'reasonable and lawful changes' in the rates on agricultural products as are consistent with the maintenance of an adequate transportation system. The word 'reasonable' is stricken out, leaving the Commission to fix such 'lawful' rates, and in the judgment of the conferees this makes no substantial change, as they believe that no rates can be fixed that are 'lawful' which are not reasonable, 'reasonable' taking into consideration all of the elements that should be taken into consideration. We have given very careful thought to it, and in our judgment it does not substantially change the law." (65 Cong. Rec., 11246.)

The proper interpretation of the Resolution.

What we believe to be the correct interpretation of the Resolution was given by Senator Glass, before the Senate Committee on Interstate Commerce (Report of Hearings on the confirmation of John J. Esch to be a member of the Commission, pp. 76, 77):

> "There is nothing unconstitutional about the Hoch-Smith resolution. There is really nothing contrary to the statute in the Hoch-Smith resolution. I have not been here, but I assume your attention has been called to the fact that the res-

olution directs this inquiry and the conclusions to be had in accordance with the law. Therefore, the Hoch-Smith resolution did not modify in the remotest way the statute itself. It was a mere expression of the sense of Congress that if at that time, momentarily, any relief could be given to these interests in accordance with law, that Congress would desire it to be done. That is all there is to the Hoch-Smith resolution."

Interpreted as a whole the Resolution is entirely consistent with established principles of law and capable of practical application. Being convinced, as indicated by the reports and debates already quoted, that the rate structure of the country had grown up in a haphazard fashion; that it was unscientific in its construction and in the distribution of the burden of transportation; that it was rigid and did not accommodate itself to the changes which were taking place in industry and which were reflected in transportation; that the horizontal increases and reductions made during the stress and emergency of war and post-war conditions had increased the disparity and that as a result the rate structure contained many injustices and inequalities and, therefore, violations of the existing law, Congress by the Resolution directed its agent, the Interstate Commerce Comm'ssion, substantially as follows:

"Keep in mind that railroad rates should reflect the value of the service as well as cost, and undertake at once a complete investigation of the whole railroad rate structure to see that it conforms to those principles laid down in the Interstate Commerce Act that rates shall be rea-

sonable and uniform in their application, making such changes as you find necessary to remove any injustices or illegalities found to exist, and to make the rate structure conform to industrial conditions as they exist from time to time, and as they are reflected in transportation so that traffic may freely move as economic conditions permit, unhampered by the arbitrary restrictions of illegal rates. If in the course of that investigation you find any such injustices or illegalities existing in the rates on agricultural products now suffering from depression, they should be immediately removed without awaiting the final conclusion of your investigation, as agriculture should not be required to continue paying rates which are illegal or unreasonable and higher than required to maintain an adequate transportation system."

So interpreted the Resolution is a consistent whole, centered around the general investigation therein directed to be undertaken, avoids any possible question as to its constitutionality and is wholly in accord with the letter and spirit of the Interstate Commerce Act, which was obviously in the mind of Congress in its repeated references throughout the Resolution to "lawful changes", "lawful rates" and the consideration of certain matters "insofar as it is legally possible to do so".

"Lawful" as used in the Resolution does not mean "in accordance with the existing law and the Resolution" as though different principles were enunciated in each. Such a view could be entertained only if the Resolution had separately stated a new principle and then directed changes in accordance with law. But the

principles stated in the Resolution were in every instance, in terms qualified by reference to "lawful changes", "lawful rates", "in accordance with law" or "to the extent it is lawfully possible to do so". The declaration of a policy that conditions in industry shall be considered "to the extent it is lawfully possible to do so" can only mean that the policy stated shall apply if, and only to the extent, permitted by pre-existing law. It imports no direction that such policy be pursued in addition to the pre-existing law, to the extent lawfully possible. Such a qualification could refer only to the Constitution and would exist whether expressed or not. To construe the Resolution as contended for by the Commission would distort the plain meaning of the terms used in the enactment, violate cardinal rules of statutory construction, and raise serious constitutional questions which should be avoided if possible.

The reports and debates in Congress fortify our interpretation of the Resolution and show that there was "no new proposition involved" in the first and third paragraphs of the Resolution. (The second paragraph, directing the general investigation of rates is not involved in this connection.) Senator Cummins explained that "Undoubtedly the Interstate Commerce Commission has complete and adequate power to reduce freight rates in exact accordance with the declaration made by this joint resolution".

What was the power of the Commission under the law, with which the Resolution was in exact accord-

ance? It was limited to a consideration of the value of the commodity in relation to other commodities, and excluded any consideration of the profits of the shipper or carrier or the absence thereof. The desire of producers to reach a market, the necessity of such markets to dispose of surplus production, the profitableness of their business or its poverty could not influence the level of rates. Orders of the Commission prescribing rates to equalize fortune or opportunity or to meet the commercial necessities of the shipper are void. As was said by Mr. Justice Holmes in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46:

> "The law does not attempt to equalize fortune, opportunities or abilities."

Similarly the direction that the lowest possible lawful rates compatible with the maintenance of adequate transportation service be prescribed to the end that agricultural products suffering from depression may move freely in interstate commerce manifested no purpose to change the law or set up any standard in addition to those contained in the Interstate Commerce Act. This paragraph was also explained as being within the existing powers of the Commission. It was paraphrased by Mr. Hoch, in charge of the bill in the House, as follows:

> "We direct that you shall with the least practicable delay make such changes in the freight rates upon farm products, including livestock, as will as far as possible *correct any injustices that may be found to exist* and promote the freedom

of movement of those products." (65 Cong. Rec. 11018.)

A direction to correct injustices, or as expressed in the report of the Committee, to give agriculture "every *consideration* in the matter of rates consistent with the maintenance of adequate transportation service" is not a declaration of a new principle that it be given preferential treatment based wholly on its commercial necessities and regardless of transportation conditions. It can only mean that the existing laws should be applied promptly and effectively. It cannot be implied from this language that Congress intended to vest in the Commission a new power to give preferences to agriculture which the Act specifically prohibited the carriers, the owners of the private property, from creating or maintaining. Much less can it be implied that such preferences should be extended even as between agricultural products, solely on the ground of their relative prosperity or adversity, as was done in this case. Under the existing law, which was not changed, this could not be done.

Under the existing law commercial conditions could be considered by the Commission only in so far as they had a bearing on the transportation conditions by which the reasonableness of rates was to be determined. Under the Resolution, as applied by the Commission, the relationship was wholly reversed as to agricultural products suffering from depression. The Commission applied the Resolution as making commercial conditions the controlling factor, as to

such commodities, and as excluding the transportation conditions which had formerly supplied the evidence upon which it was to exercise the "judgment which belongs to the power to fix rates". The process became automatic and the Commission became a mere auditor, to verify the fact of depression, no matter how caused, and then fix the lowest rates that could be established without violating the carriers' constitutional rights.

Such a revolutionary change could only flow from a clear and express statement of legislative intent to that effect. It is not to be implied by a strained interpretation of a joint resolution, which on its face was addressed solely to the Commission and not to the carriers.

It should be noted that the enactment was a joint resolution approved by the President. While it is true that a joint resolution so approved has the force of law, it is proper to consider the generally recognized difference between an act of Congress and a joint resolution.

> "The difference between an act of congress and a joint resolution is that the former governs all persons under the jurisdiction of the enacting power, while the latter is but a rule for the guidance of the agents and servants of the sovereign. 26 Am. & Eng. Enc. L. 560 and notes."
>
> *S. H. Hawes & Company v Wm. R. Trigg Co.*, (Va.) 65 S. E. 538, 552; 110 Va. 165.

Under the Interstate Commerce Act the carriers have the right to initiate rates. So long as the rates

they initiate are not "unreasonable" or "unjustly discriminatory" or "unduly preferential" or otherwise in contravention of some positive provision of the Act, the Interstate Commerce Commission under the Act is without power to change such rates. It is submitted that the Resolution interpreted according to its plain terms and in the light of its legislative history, and in accordance with the accepted principles of statutory construction, was not intended to and does not change the provisions of the Interstate Commerce Act, but is an admonition to the Interstate Commerce Commission, as the administrative agent of Congress, to enforce the provisions of the Act, and that it gave no power or authority to the Commission to reduce an existing reasonable rate fixed by a carrier.

I. **Errors of the Commission in construing and applying the Resolution.**

A. **The Commission construed the Resolution to require it to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful. This was a misconstruction of the Resolution. The Resolution required that the Commission reduce existing rates on agricultural products only if such rates were unreasonable or discriminatory, or otherwise unlawful as measured by the provisions of the Interstate Commerce Act.**

The Resolution properly construed did not change the law which existed prior to its enactment. It did not prescribe any new or different standard of lawfulness; and it did not authorize the Commission to depart from the standards of rate making which were prescribed in the Interstate Commerce Act. The Commission, pursuing what it considered to be the

intent of Congress that rates on agricultural products suffering from depression should be reduced, proceeded to reduce this rate to a point where in the view of the Commission it would yield to the carriers a return slightly exceeding operating expenses. In so doing it substituted what it considered the wish of the Congress for the requirements of the Resolution. The situation is similar to that in the *Passenger Scrip Case* (*United States v. New York Central R. R. Co.*, 263 U. S. 603, 611), where Mr. Justice Holmes aptly said in speaking of an order of the Commission directing the issue of mileage tickets at a reduced rate, "But we think it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, * * *".

The purpose of those who advocated the Resolution may have been to hold out to the agricultural interests the prospect of decreased rates on the products of the farm. But the Resolution, as finally adopted, directed reductions in the rates on agricultural products only where such reductions could lawfully be made; that is, where the Commission found that such rates were, for some reason, inherently unreasonable, or otherwise in violation of the Interstate Commerce Act. The situation was similar to that in the *Passenger Scrip Case* (supra), where it was said regarding a statute directing the issue of passenger scrip at reasonable rates (610): "Coming as it did from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise, but in

fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act." And so here. The Resolution requires the fixing of a just and reasonable rate exactly as in any other case arising under the Interstate Commerce Act and does not authorize the Commission to alter a reasonable rate fixed by a carrier.

The Commission itself, in an earlier proceeding, says of the Resolution, "It sets no new standard of lawfulness * * *."

Grain and Grain Products, 122 I. C. C. 235, 264.

But in the face of all this the Commission proceeds in the present case to state, "We again conclude that 'the lowest possible lawful rate' which we may prescribe *under the resolution* on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service" (R. 28). What this lower level or limit is in this case is apparent from the face of the report. It is a rate which "must *in principle* be high enough to cover all the cost that may fairly be allocated to the service plus at least some margin of profit" (R. 26). It is a rate "slightly above the operating expenses", and "probably of less than average profitableness" (R. 67). It is a rate which the Commission designedly attempted to fix just high enough above the

point of confiscation to escape the ban of the Fifth Amendment. At no time did the Commission intend it to be that "just and reasonable" rate mentioned in the Interstate Commerce Act or intend to fix it upon the basis prescribed in that Act. It had already decided that the old rates were not in violation of any provision of the Interstate Commerce Act (100 I. C. C. 79). The Commission construed the Resolution as requiring it to cease exercising its discretion in so far as rates on agricultural products suffering from depression were concerned, and to perform the purely mechanical function of fixing "the minimum charge that can be made for the service and permit the carrier to live" (R. 27). It construed it as directing it to forthwith reduce an existing rate, if it was in excess of the irreducible minimum, even though the existing rate had been established by the carrier and was reasonable measured by the standards of the Interstate Commerce Act.

That the Commission has deliberately construed the Resolution as requiring a wholly different standard to be applied than is set by the Act, appears not only in its report in this case, but also from its reports in subsequent proceedings under the Resolution. In

South Carolina Produce Assn. v. A. & R. R. Co., 152 I. C. C. 5, 27,

it is said:

"Moreover, in view of the fact that the rates which we propose to prescribe will be, in our judgment, the lowest possible lawful rates which may properly be prescribed, under the evidence

in this case, such a standard, prescribed for the future, can not be accepted as a standard of reasonable rates in the past. *That resolution directs us to take into consideration the economic necessities of a shipper when fixing a rate structure. Rates made in contemplation of that resolution are less than maximum reasonable rates.* This inevitably follows from the provision of the law. A certain zone of reasonableness is created within the limits of which any rate so falling must be considered reasonable. We can prescribe such a basis for the future; but if we have settled upon the measure of such a rate taking into consideration the provisions of the resolution, *it is clear that a rate arrived at upon such considerations is not a maximum reasonable one.* If such be true, it is unsound automatically to take a rate found reasonable for the future in the light of the Hoch-Smith Resolution and prescribe it in the past as a basis for reparation, because to do so would be to award damages down to the basis of a rate which admittedly is lower than a reasonable maximum."

In *Muller & Co. v. Pere Marquette Ry. Co.*, 151 I. C. C. 787, it was found that the producers of chicory in Michigan were suffering from depression. It was further found (p. 793):

"Considering all the evidence of record, it can not fairly be said that the rate assailed is higher than a reasonable maximum rate over either route. * * *

"We therefore find from the evidence that the assailed rate was and is not in excess of a reasonable maximum rate, but that for the future the rate assailed will be unreasonable and in excess of the lowest possible lawful rate compatible with the maintenance of adequate transportation service * * *"

Such a construction does violence to the very terms of the Resolution and runs counter to its meaning as explained by its authors and sponsors. The Resolution requires that the changes be "lawful changes", and that the rates be "lawful rates"; lawful in view of the existing law.

The Interstate Commerce Act and the Constitution constitute the law referred to in the Resolution.

Section 1 of the Act provides that:

> "All charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful";

Section 3 of the Act provides that:

> "It shall be unlawful * * * to make or give any undue or unreasonable preference or advantage * * * or to subject any particular person * * * or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage * * *."

Section 15 of the Act provides that:

> "Whenever, after full hearing, upon a complaint, * * * or * * * under an order for investigation and hearing made by the commission of its own initiative, * * * the commission shall be of the opinion that any * * * rate * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, * * * the commission is authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * *."

These provisions fix and limit the authority of the Commission. They constituted the law governing the

power of the Commission in prescribing rates at the time of the passage of the Resolution. They constitute the measure of the "lawful" changes and the "lawful rates" which the Commission was authorized to prescribe under the Resolution.

Under these sections it has been held that

> "A carrier is entitled to initiate rates, and, in this connection, to adopt such policy of rate making as to it seems wise."
>
> *United States v. Illinois Central R. Co.*, 263 U. S. 515, 522.

and the powers of the Commission have been defined as follows:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. * * *"
>
> *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*, 227 U. S. 88, 92.

Under the Interstate Commerce Act, no power is given the Commission to regulate the policy of business, to encourage weak industries, to give aid to those in need. It has frequently been held that a rate cannot be based upon the reason that it is to the advantage or disadvantage of certain industries or localities.

Thus in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46, Mr. Justice Holmes says:

"The law does not attempt to equalize fortune, opportunities or abilities."

The Commission itself has declared that:

"* * * The power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as part of one great whole. * * *"

Ashland Fire Brick Company v. Southern Ry. Co., 22 I. C. C. 115, 121.

In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 598, Mr. Justice Hughes said:

"Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others may be served at a rate unreasonably low. That would be but arbitrary action."

In *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 553, 555, the court's opinion indicates that it would be wrong to base a rate upon the condition of the lumber business.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, the court set aside an order of the Commission which declared an increased rate on lumber to be unreasonable. The carrier insisted that, "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate," yet in effect it "was based upon the assumption by that body of the possession of a power not conferred by law" (p. 443). It also insisted that

the order of the Commission was void because it "did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order * * * upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate."

The court held that the Commission's order, in effect, "was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate" (p. 449). This misinterpretation of its powers made the order void. The opinion, quoting counsel's characterization of the power exerted, terms it "an abnormal and extraordinary power", and one "which, if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads", one which "would in effect assert public ownership without any of the responsibilities which ownership would imply" (p. 444).

The case was referred to in the case of

Chicago, Rock Island & Pacific Ry. Co. v. United States, 274 U. S. 29, 33.

Mr. Justice Sutherland says of it:

"In that case [*S. P. Co. v. Interstate Commerce Commission,* 219 U. S. 443] it appeared upon the face of the record that the commission

had not exerted its power to correct an unjust and unreasonable rate, but had made the order complained of upon the theory that it possessed the power to set aside a just and reasonable rate whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate."

In *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 221, the court held that the Commission has not the power to reinforce the tariff laws, so as to give protection to American manufacturers and producers from competition by foreign low-priced labor. The tariff laws, said the court, "differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government" (p. 220).

In *McLean Lumber Co. v. United States*, 237 Fed. 460, 470, before Circuit Judge Warrington, and District Judges McCall and Sanford, the court said:

"* * * It is the duty of the Commission, in passing on the reasonableness of a rate, to consider the conditions affecting the welfare both of the shippers and the carriers. *Texas Railroad v. Interstate Commission*, 162 U. S. 197, 219 * * *. However, the carrier is not to be denied the right to change from an unreasonably low rate, which has formerly prevailed, to a just and reasonable charge for the future, merely because of the injurious consequences which would arise to shippers from a change in the rate. *Southern Pacific Co. v. Interstate Commission*, 219 U. S. 433, 449 * * *; *Atchison Railroad v. Interstate Commission* (Comm. Ct.) 190 Fed. 591, 594, and

203 Fed. 56, affirmed * * * 231 U. S. 736; and *Rates on Crushed Stone,* 29 I. C. C. 136."

In *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission,* 190 Fed. 591, the Commerce Court held void an order reducing the rate on lemons. The rate had been reduced to a point at which, in the judgment of the Commission, California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible. "In other words", to quote from the opinion of the Court (p. 592), "the Commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition". The court further said (p. 594):

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any consideration which the commission may deem best for the public, the shippers and the carrier. Its order must be based on transportation considerations. * * *.
>
> "As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the commission." (p. 596)

In *Anchor Coal Co. v. United States,* 25 Fed. (2d) 462, the court discussed in considerable detail the powers of the Commission under the Act, and as

affected by the Resolution. It reviewed the foregoing decisions and concluded that (p. 472),

> "The Commission does not have the right, however, to regulate industrial conditions under the guise of regulating rates."

The effect of the amendments to the Act, made by the Transportation Act of 1920, were considered and the court said (p. 473),

> "But we are satisfied that it was never intended by the act that, in exercising this power, the Commission should consider the loss of business of one community due to industrial conditions and attempt to restore it by increasing the differential in the freight rates between that community and others which compete with it."

The effect of the Hoch-Smith Resolution was also considered and the court said (p. 473):

> "The Commission seems to have thought that it was justified in considering industrial conditions and the shift of traffic as a reason for widening the differential because of the provisions of the Hoch-Smith Resolution."

After quoting the Resolution the court held (p. 474):

> "So far as the general language of the resolution is concerned, to the effect that the conditions which prevail in industry should be considered in adjusting freight rates, to the end that commodities may freely move, this is no more than a general declaration that freight rates shall be adjusted in such a way as to provide the country with an adequate system of transportation, and Congress certainly did not intend by this language to create in the Commission an economic dictatorship over the various sections of the country, with power to kill or make alive. If the

Commission has the right in a rate adjustment to consider the shift in traffic to a community already paying a higher rate, and act upon it as one of the factors in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift in cotton manufacturing, in fruit growing, in furniture manufacturing, in short in every branch of industry, will become a matter for consideration by the Commission; for all depend upon freight rates, all have rates in which the differential between long and short hauls is narrow, and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. We feel perfectly certain that Congress did not intend to vest such power in the Commission. And the fact that the Commission seemed to consider that the Hoch-Smith resolution required it to consider or give effect to industrial conditions and the shift of traffic, or at least showed a spirit and purpose in that regard which should be deferred to, is of itself sufficient to invalidate the order complained of. U. S. v. N. Y. Cent. R. R., 263 U. S. 603, 610, 44 S. Ct. 212; 68 L. Ed. 470."

The repeated declarations by the courts to the effect that the purpose of rate-making is not to "equalize fortune or opportunities"; criticisms of action by administrative bodies regulating rates as being taken "for the purpose of equalizing industrial conditions"; the reference to the exercise of such a function as "abnormal", "unprecedented", "extraordinary", "arbitrary action", plainly indicate, what is already clear from the language of the acts regulating interstate commerce, that the granting of aid directly to a "distressed industry", through the agency of rate regula-

tion is forbidden by existing legislation. To permit such a principle of rate-making would constitute the Commission the economic dictator of the country, would lead government into dangerous experiments and would tend to great injustice and disarrangements in the affairs of industry and agriculture.

The phrase "lowest possible lawful rates compatible with the maintenance of adequate transportation service" does not warrant the Commission's conclusion that a rate barely avoiding confiscation is required to be established for agricultural products suffering from depression.

The Commission's view might have found support in the language of the Resolution as originally introduced in the Senate, which directed, as to agricultural products suffering from depression, "the lowest possible rates". Under such language the minimum rate permitted by the Constitution might have been referred to. But the Resolution was amended, before debate in the Senate, to substantially its present form by inserting therein the requirement that the rates were to be "lawful" and also that they were to be "compatible with the maintenance of adequate transportation service", neither of which requirements appeared in the original draft. As so amended it refers to the standards of section 15a as well as of section 1 of the Act. By section 15a the Commission is directed "in the exercise of its power to prescribe just and reasonable rates" to adjust rates so that the carriers will be permitted to earn a fair re-

turn on the value of their properties. The Commission is to fix what will be a fair return, giving due consideration "to the transportation needs of the country and the necessity * * * of enlarging such facilities in order to provide the people of the United States with adequate transportation". The rates to be prescribed under the Resolution are not to be at the lowest limit of the zone of reasonableness, conceding for the moment that there is such a zone, but are to be lawful rates, i. e., just and reasonable rates sufficient to maintain adequate transportation service.

The only effect of the words "lowest possible" preceding "lawful rates compatible with the maintenance of adequate transportation service" is to emphasize to the Commission that the rates on agricultural products suffering from depression shall be no higher than required to conform to section 15a and shall be as favorable to the shipper as consistent with the provisions of the Act. When read with the context in which used they carry no implication that a new standard was intended to be created, particularly a standard not for uniform application, but to be used to favor certain classes of shippers and dependent entirely on conditions unrelated to transportation; conditions which had never before been permitted weight in fixing rates and which, as we will show hereafter, cannot under the Constitution be considered.

It is submitted that when the Commission deemed itself under the duty to reduce a reasonable rate

because it was not in the judgment of the Commission "the lowest possible lawful rate" (i. e., just above the point of confiscation), it misapplied and misinterpreted the Resolution. The purpose of the Commission to reduce rates on agricultural products suffering from depression may have been laudable, but that object could only be accomplished in those cases where the existing rates were unreasonable under the existing law.

The Commission in this case seems to have followed the same mental processes as witness Hendrick, who testified before the Commission (R. 196).

> "There was a time when railroads begged for assistance and they got it and the farmer paid the bill. The farmer is today in exactly the same position that the railroads were then. He is asking the government of the United States and the railroads to get behind him and give him relief. The government cannot change climatic conditions, but it can change many things, among them freight rates. There ought to be a very considerable reduction in freight rates."

The wish may have been father to the thought, but the accomplishment of the wish "required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act". *United States v. New York Central R. R.* (supra). The Commission here did not pretend to determine what was "just and reasonable" exactly as in any other case. It considered that Congress had prescribed a new measure, a rate barely above the point of confiscation, and it was rigidly applying that

measure. In this it erred, and the order is therefore void.

B. If the Resolution properly construed authorizes the Commission to reduce existing reasonable rates, such reduction is only authorized where it is "compatible with the maintenance of adequate transportation service". The Commission has interpreted this to mean that a reasonable rate may be reduced, although the carriers are not earning the fair return specified pursuant to Section 15a. This is in effect to repeal Section 15a, and is an improper interpretation of the Resolution. If the Resolution authorizes the Commission to reduce a reasonable rate, where the carriers are not earning a fair return, it also requires that other rates be adjusted simultaneously so that the carriers' revenue already inadequate, will not be impaired further.

The Resolution directs the Commission to effect such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by depression at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

We have already pointed out that this prescribed no new standard of rate making, invested the Commission with no greater or different powers than it already possessed, and left the provisions of the Interstate Commerce Act unchanged. Perhaps it was an excess of caution that induced the Congress not only to provide that the rates prescribed under the Resolution should be "lawful changes", and the rates "lawful rates", but also to specify that such rates must be "compatible with the maintenance of adequate transportation service". These words were not

picked out of the air. They are strangely like the words, "in order to provide the people of the United States with adequate transportation", which appear in section 15a (3) of the Interstate Commerce Act. They are even more similar to the expression used in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, where this court in speaking of the Transportation Act said, "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to maintain an adequate railway service for the people of the United States."

From the text of the Resolution it is therefore clear that the Congress intended that the Commission in proceeding under the Resolution should do nothing which would interfere with the affirmative duty imposed upon the Commission by Congress, to fix rates so that the country would be provided with an adequate system of transportation.

Until the enactment of the Transportation Act of 1920, regulation of the carriers had been repressive in character. The government was concerned merely with the prevention of certain abuses by the railroads, including the charging of unreasonable rates and discriminatory practices. The Transportation Act marked a new departure, in which for the first time the Congress recognized that railroad problems required affirmative treatment as well as repression. The affirmative policy of providing the country with

an adequate system of transportation by requiring that rates be fixed so as to yield the carriers a fair return was concretely stated in section 15a of the Act, which imposed upon the Commission the affirmative and continuing duty,

> "In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole * * * will * * * earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return * * *."

That section provides further:

> "The commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon * * *. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity * * * of enlarging such facilities, in order to provide the people of the United States with adequate transportation * * *."

The Transportation Act, 1920 (41 Stat. p. 456) also provides (sec. 500):

> "It is hereby declared to be the policy of Congress * * * to foster and preserve in full vigor both rail and water transportation."

The purpose and effect of this legislation has been aptly summarized by this court in the *New England Divisions Case,* 261 U. S. 184, 189, as follows:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Rail-*

road Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed."

In *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 478, the court said:

"The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

Shortly after the enactment of the Resolution, it was urged in behalf of certain shippers in a proceeding pending before the Commission, in which carriers in the Western District were seeking increases in freight rates (*Revenues in Western District,* 113 I. C. C. 3, 11), that the Hoch-Smith Resolution,

(1) "had the effect of repealing those portions of Section 15a of the interstate commerce act on which the carriers' petitions are based," and

(2) "that the rates on agricultural products, including livestock, in effect at the time of the approval of the resolution, became in effect the legislative maximum rates on those commodities, which may not be increased except upon a finding by us [the Commission] or the courts that the existing rates are confiscatory."

As to the latter contention, the Commission concluded:

> "we are of the view that we are not debarred by the resolution from affording the carriers relief through the medium of a general increase in rates prior to the completion of the investigation under that resolution, if need for such action arises upon a clear showing of necessity. Both section 15a and the resolution must be given a construction which makes them practicable and workable. See *New England Divisions Case,* 261 U. S. 184, 197."

The contention that the Resolution repealed section 15a was also rejected by the Commission in the following language:

"With the contention that the resolution repeals section 15a we are not in accord. The resolution has the force and effect of an act of Congress. In it there is no specific repeal of any provision of existing law, and there is no reason for holding that the resolution by implication repealed or suspended the provisions of section 15a.

"The resolution clearly points out that in making any change in accordance with its provisions, we shall give due regard 'to the maintenance of an adequate system of transportation', and that the fixation of the 'lowest possible lawful rates on products of agriculture, including livestock,' shall be 'compatible with the maintenance of adequate transportation service'. These are expressions somewhat similar to those used by the Supreme Court in decisions rendered prior to the adoption of the resolution, specifically referring to the provisions of section 15a wherein Congress indicated that in determining what would be a fair return consideration should be given, among other things, to the transportation needs of the country and the necessity of enlarging such facilities in order to provide the people with adequate transportation. See *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, 585, decided February 27, 1922; *New England Division Case*, supra, page 190, February 19, 1923; *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 478, January 7, 1924. Congress could not have intended to repeal or suspend by indirection so important a provision of law as section 15a."

This was followed by the further significant statement (p. 13):

"It is provided by the resolution that we shall prescribe on products of agriculture so affected by depression, including livestock, the lowest

possible lawful rates. It is contended, therefore, that the present rates thereon may not be increased unless they are found to be confiscatory. While confiscatory rates are unlawful, *it does not follow that all rates which escape confiscation are lawful.* As we construe the resolution, it does not prevent increases of rates on all livestock, or on all products of agriculture which are above the point of confiscation."

Evidently the view of the Commission has undergone some change since this was written (July 14, 1926), for in the instant case the Commission consciously and intentionally fixed a rate which it considered would be just above the point of confiscation.

It is clear that the Resolution did not repeal section 15a. Not even the Commission thought that. But what attention if any did the Commission pay to section 15a when it considered the rates in this case? What attention did it pay to the explicit provision in the Resolution that the rates must be "compatible with the maintenance of adequate transportation service"? From the face of the report it is plain that the Commission in this case ignored its affirmative duties under section 15a and disregarded the requirement of the Resolution that the rates be compatible with the maintenance of adequate transportation service.

The reduction ordered by the Commission deprived the carriers of annual revenue in excess of $2,700,000. This revenue was taken principally from the western carriers who handle the bulk of the traffic. The western carriers deprived of this revenue were

admittedly not earning the fair return prescribed pursuant to section 15a. We have, therefore, an order of the Commission, depriving carriers who are not earning a fair return, of revenue in excess of $2,700,000 per annum. And this reduction in revenue results not from the lowering of an unreasonable rate, but from the lowering of a reasonable rate, which was lowered because it was in excess of what the Commission considered to be the "lowest possible lawful rate compatible with the maintenance of adequate transportation service". But how can a rate be compatible with the maintenance of adequate transportation service when it is brought about through the reduction of a reasonable rate, and is accompanied by a reduction of more than $2,700,000 in the annual revenue of carriers which are not earning the fair return prescribed pursuant to section 15a?

It is submitted that a proper construction of the Resolution in the light of Section 15a makes necessary adherence to the following principles:

(1) The lowest possible lawful rates compatible with the maintenance of adequate transportation service are the just, reasonable and non-prejudicial rates which are required by the Interstate Commerce Act, so related to the general rate structure as to produce the fair return contemplated by that Act.

(2) As asserted by it in *Increased Rates, 1920,* 58 I. C. C. 220, at 226, the Commission may exercise reasonable discretion in fixing the rate of return, but, once fixed, the administrative task devolves upon the Commission of fixing such rates as will yield in the aggregate the fair return, as nearly as may be.

(3) In *Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co.*, 257 U. S. 563, at 586, the inter-relationship between Sections 13 and 15a of the Interstate Commerce Act is discussed. The phraseology of the Resolution makes clear the same necessary inter-relationship with Section 15a. The Resolution repeats and affirms the intent to maintain an adequate system of transportation.

(4) This Court, in *New York v. United States*, 257 U. S. 591, at 602 (in addition to the *Wisconsin case*, *New England Division case*, and *Dayton-Goose Creek case*), has enunciated the proposition that the Interstate Commerce Commission must attempt to secure a fair return through the medium of initiating rates under Section 15a so as to carry out the declared purpose of Congress.

(5) The Commission can not carry out that purpose by proceeding as it has in this case. Its only discretion under Section 15a in respect of the maintenance of an adequate transportation service is to fix, within reasonable limits, the percentage which shall constitute a fair return on the aggregate property value. Beyond that, its administrative duty is to fix rates so as to yield the fair return as nearly as may be. Instead, it has here attempted to substitute for the fair return which Congress considered essential to maintain an adequate transportation system, a test not recognized by the law, namely, that the financial condition of these carriers is "relatively strong".

(6) A reduction in a single rate, found to be unreasonable under the Act, might undoubtedly be made

without specifically considering the requirements of Section 15a (*Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, at 480; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, at 549). But where an important rate adjustment, involving large sums, is under consideration, and the rates are not found to be unreasonable under the Act, the Commission must of necessity consider Section 15a and its duty thereunder. In *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331, the court held that the building of a union station in Los Angeles could not be required without the approval of the Commission. One of the chief reasons given was that the expenditure of large sums might well impair "the financial ability of interstate carriers to discharge their interstate commerce duties" (pages 344, 345, 346 and particularly 347).

What the Commission set out to do and what it did.

The Commission, as has already been pointed out, set out to fix a rate "at the lowest limit or level" of the zone of reasonableness which was defined by the Commission to be at or above "the minimum charge that can be made for the service and permit the carrier to live" (R. 27). That the Commission carried out its intention to at least that extent is shown by the Commission's own estimate of what it did. It stated (R. 67) that if the cost study of the carriers was accepted (and in its original report it did accept it),

> "it would indicate that the prescribed rates are slightly above the operating expenses and would

confirm the impression obtained from comparison with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

The new rates in the opinion of the Commission would yield something over operating expenses.

The Commission found (R. 53):

"Of the traffic involved, over one-sixth originates on short line railroads in California. At least four of these are now operating at a deficit."

"The Santa Fe and the Baltimore and Ohio are the only carriers shown as having earned in excess of 5.75 per cent in 1926. For 18 principal carriers in the western district, including the Illinois Central system, the average return in 1926 was 4.43 per cent and for five principal carriers in the eastern district, 4.9 per cent. All the foregoing rates of return are computed with respect to the property investment accounts."

This compares with the 5.75% fixed by the Commission as a fair return pursuant to section 15a (68 I. C. C. 676).

The Commission also finds (R. 56):

"While all the defendants who handle the bulk of the deciduous fruit traffic have not as yet made the fair return, their financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

The Commission admits (R. 67) that the new rates are of "less than average profitableness". The average profit from all rates, prior to the reduction here

ordered, produced less than a fair return. The best that can be said of this finding is that the Commission does not believe bankruptcy will result from the new rates.

Bearing in mind that the expression "maintenance of adequate transportation service" has reference to the provisions of section 15a, which place the affirmative duty upon the Commission to fix rates that will yield the carriers a fair return, how can a reduction of $2,700,000 in the revenue of carriers which the Commission admits and finds (R. 53) are not earning their fair return be compatible with the maintenance of adequate transportation service? The test is not whether the financial condition of the carriers is relatively strong. "Relatively strong" means only that the carriers are better off financially than they were during a period when their finances were in a state of demoralization. What finally determines whether there is to be adequate transportation service in the future, which is the object sought to be achieved by section 15a, and the object sought to be protected by the specific language of the Resolution, is whether the carriers are earning a fair return.

We do not contend that section 15a prevents the Commission from reducing a rate which is unreasonable. That power is expressly reserved by the provision in section 15a that "the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable". But, as has been shown, the rate here was not unrea-

sonable, and was not considered by the Commission to be unreasonable. Its findings show that the reduction was ordered because the old rates were not the "lowest possible lawful rates" as defined by it and not because the old rates were inherently unreasonable.

It is submitted that the Commission thereby gave effect to the Resolution as modifying Section 15a. It reduced an existing reasonable rate without any regard to the effect of such reduction upon the earning of a "fair return" which Congress had declared was necessary for the maintenance of adequate transportation. Section 15a declared that the maintenance of adequate transportation in the future required the Commission "in the exercise of its power to prescribe just and reasonable rates" to initiate rates which would yield a fair return. The Resolution requires rates "compatible with the maintenance of adequate transportation service". The Commission must have construed this phrase in the Resolution as meaning something different from the earning of a fair return as directed by Section 15a, because, in reducing rates theretofore found reasonable, and not now found to be unreasonable under the Act, the Commission has given no consideration to the effect of such reduction upon the earning of a fair return, but has satisfied itself with the finding that the financial condition of the carriers involved was "relatively strong".

The error of law in construing the statute and the Resolution into which the Commission has thus fallen is thrown into bold relief in later decisions. Thus in *Muller & Co. v. Pere Marquette Ry. Co.*, 151 I. C. C.

787, the Commission found that a rate of 44 cents per 100 pounds on chickory from Port Huron, Michigan to New York did not exceed "a reasonable maximum rate", but nevertheless ordered it reduced to 29 cents on the ground that this latter rate "lies within the zone of reasonableness and that its establishment will not be incompatible with the maintenance of adequate transportation service". Again no consideration was given to the effect of such reduction upon the earning of a "fair return", but a rate specifically found to be not unreasonably high was reduced wholly because of the Resolution. Also, in *Rate Structure Investigation, Part 6, Iron and Steel Articles,* 155 I. C. C. 517, the majority opinion, in which six commissioners joined, reduced the rates on iron and steel articles in Eastern territory to an extent which one of the commissioners who concurred in part declared would result in revenue reductions of not less than $2,500,000. This reduction was ordered upon the basis of this statement of principle appearing at page 562 of the decision:

> "It is evident that in the accomplishment of this task the principle of what the traffic can or will bear is a factor which must be given due consideration. In other words, if agricultural products and livestock are to receive the benefit of the lowest possible lawful rates compatible with the maintenance of adequate transportation service, commodities such as the iron and steel articles here under consideration, which are able to bear relatively high rates, must be accorded rates which approach but do not exceed reasonable maxima."

This construction of the Resolution and the statute could only be the law in the event that the Resolution

has modified the statute. If the Resolution requires that reasonable rates on agricultural products shall be reduced and that rates on other products "which are able to bear relatively high rates" must be so made that they will only "approach", but not exceed, reasonable maximum rates, it is apparent that a different standard for the maintenance of adequate transportation service has been adopted than the earning of a fair return. It is to be recalled that Section 15a specifically provided that the rate-making power there to be exercised was a part of the power of the Commission "to prescribe just and reasonable rates". Clearly the Commission has construed the Resolution as requiring it to make all rates on agricultural products suffering from depression considerably below the level of reasonableness, as maintained prior to the Resolution, and also to make the rates on other products so that they will only "approach" the level of reasonableness which the carriers might have maintained prior to the Resolution.

These interpretations by the Commission of the Resolution clearly show that it is proceeding under a misapprehension of what the law requires it to do. While the Commission has specifically declared that the Resolution did not modify Section 15a, in actual practice it has given such application of the Resolution as most effectively to modify Section 15a. In this case, and in other cases which have arisen under the Resolution, it has proceeded to reduce reasonable rates without making any investigation of its own in respect to the intrinsic cost of the service, without finding that undue preferences have been accorded to

other traffic, and without even basing such reductions upon comparisons with rates on other commodities, but wholly and solely because it seems to believe that Congress in passing the Resolution expressed a desire that such rates should be reduced. This we say is a misconstruction of the Resolution and a violation of the law, because it is not the fixing of "the lowest possible lawful rate compatible with the maintenance of adequate transportation service" as the standard for such maintenance had been theretofore declared by Congress and commented upon by the Supreme Court, nor is it a compliance with the duty imposed upon the Commission by Section 15a to initiate rates that will yield the carriers a fair return.

The most that could be said for such a construction of the Resolution would be that if carriers, not earning a fair return, are to be deprived of substantial revenue by the reduction of a reasonable rate, there must be "a redistribution of rates" accompanied by a contemporaneous increase of other rates, so as to preserve the standard of a fair return. If this were deemed to be the proper interpretation of the Resolution, it is evident that the Commission has not followed that interpretation here.

C. The Commission erroneously construed the provisions of the Resolution respecting "freedom of movement by common carriers of the products of agriculture affected by that depression" to mean that notwithstanding a long, steady and "enormous increase in the tonnage of such fruits" in interstate commerce, freedom of movement did not exist unless the shippers were making a profit.

The Resolution declares it to be the true policy in rate making "that conditions which at any given

time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move". It further directs the Commission in view of the existing depression in agriculture "to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service * * *".

In respect of rates on agricultural products suffering from depression, the action of the Commission is directed to and limited to such changes "as will promote the freedom of movement" of such products. If freedom of movement already exists, the Resolution does not direct or authorize the Commission to make any change.

"Freedom of movement" was therefore a material issue. If there was freedom of movement under the existing rates, the Commission had no authority under the Resolution to change them, unless they were unreasonable or discriminatory as measured by the provisions of the Act.

What does the phrase "freedom of movement" mean? Does it mean the free flow of commerce unimpaired by unreasonable or discriminatory rates? Or does it require in addition that the shippers enjoy a profit on their business, notwithstanding that the rates are reasonable and that there has been a steady and unprecedented increase in the transportation of

the products, and notwithstanding that the failure of the shipper to realize a profit is due not to something connected with transportation, but to overproduction by the shipper, or to the accidents of business? The latter is the construction put upon the phrase by the Commission. It is submitted that such a construction is erroneous.

One of the outstanding facts in this case is the long continued and substantial increase in the movement of deciduous fruits under the rates here under consideration. This is shown by the number of cars moving annually since 1905, as follows (R. 223):

Year	*Total*	*Grapes*
1905	6,326	1,602
1906	5,557	2,052
1907	6,459	3,460
1908	10,719	3,819
1909	13,122	5,880
1910	11,936	4,948
1911	12,539	6,374
1912	13,344	6,357
1913	13,332	6,363
1914	16,146	8,773
1915	16,778	9,563
1916	17,891	9,722
1917	24,628	13,944
1918	27,417	16,358
1919	29,971	19,228
1920	35,246	24,152
1921	40,209	28,419
1922	53,961	41,463
1923	69,777	52,339
1924	66,786	54,775
1925	86,795	71,155
1926	78,803	60,786
1927*	89,835	72,330

*Shown by affidavit (R. 104).

The Commission found (R. 19) that "California ships more plums and cherries than the remainder of the United States, but by far the heaviest movement from the state is of grapes. In 1926 California shipped 81% of the car-load shipments of grapes throughout the United States (* * * and of pears) over 38% of all car-load shipments in the United States".

The Commission found that from 1924 to 1926 the production of certain fruits in California increased as follows (R. 25):

Pears	62%
Plums	82%
Grapes	33-1/3%

The Commission further stated (R. 38) that "there has been an enormous increase in the tonnage of these fruits" and Commissioner McManamy says (R. 64):

> "* * * The record discloses that the shipments of juice grapes increased about one-third from 1924 to 1926 and that the number of acres in grapes increased from 434,907 in 1923, to 635,236 in 1926. The increase in production has been vastly greater in proportion than the increase in the population of the country. * * * The record shows that each year embargoes were placed on grapes at the principal eastern cities because the supply could not be disposed of. * * *"

The dominance of the California deciduous fruit industry in the markets of the country was found by the Commission in a subsequent proceeding,

Chautauqua & Erie Grape Growers' Assn. v. Erie R. R. Co., 146 I. C. C. 403, 404.

"The principal grape producing states are California, New York, Michigan and Pennsyl-

vania. * * * There is keen competition between the Concord and California grapes for wine and table uses. * * *

"In 1926 there were 12,673 carload shipments of Concord grapes, of which 6,519 carloads originated in the Belt, 2,073 carloads in the Central Lakes and Hudson Valley regions of New York, and 3,081 carloads in Michigan. In the same year there were 64,367 carload shipments of California grapes. The principal markets for both the California and Concord grapes are in official classification territory.

"The production of Concord grapes has shown no decided trend either upward or downward in the past several years although it has been subject to wide fluctuations due chiefly to climatic conditions. The acreage in the Belt was about 41,000 in 1926, having increased only about 1,800 acres since 1920. During the same period the California grapes increased steadily and enormously in acreage and production and except for 1926 in the number of carload shipments."

This is an accurate summary of testimony given in this proceeding by representatives of the Eastern Grape Growers (R. 447, 448, 452).

That the deciduous fruit industry in California is in a state of depression is a fact that is beyond dispute. That many California deciduous fruit growers, principally growers of grapes, are not prosperous is also clear. But those facts alone, viewed in the light of the enormous growth in production, the constant and heavy increase in the shipment of the fruit to the east under these rates, and the capture and domination of the eastern market by the California product, does not show that there is a lack of "freedom

of movement". On the contrary, it indicates entire "freedom of movement" and offers no justification whatever for the conclusion that the depression in the California grape industry is due in any respect to any transportation condition. Rather it points to conditions within the industry itself, for which the industry is itself responsible.

The Commission has construed "freedom of movement" to mean that there is no freedom of movement regardless of the fact that cars and commodities move without interruption; it has held that there is not such freedom, though the rate is reasonable, if the growers are not making a profit and are not prosperous. It has measured freedom of movement by comparing the depressed condition of the fruit industry with the relatively prosperous condition of the carriers and not by any transportation standard.

The matter is discussed in the opinion of the Commission (R. 48):

> "Defendants urge that the charges for transportation have nothing to do with the existing economic conditions in the deciduous-fruit industry. They believe that the proposed reduction would not relieve the growers and claim that there is now entire freedom of movement. In support of this they point to the movement of cars for the past five years as follows:
>
> 1922,.....53,961;
> 1923,.....69,777;
> 1924,.....66,786;
> 1925,.....86,795;
> 1926,.....78,803"
>
> "According to complainant's view, however, 'freedom of movement' as used in the Hoch-Smith

resolution means more than the hauling of an unprecedented volume of traffic. The record establishes that producers are sustaining serious financial loss, that their indebtedness is increasing, that they are finding it difficult to meet taxes, that banks are foreclosing or assuming the management of properties, and that land values have been entirely deflated. Under such conditions complainant contends that freedom of movement does not exist."

In view of the decision this statement of complainant's contention must represent the construction of the Resolution by the Commission, and indicates that the Commission considers that there is no "freedom of movement" no matter how many cars or how much fruit actually moves, if the shippers are not making a profit and are sustaining serious financial loss. It is significant that there is in the report and order no direct finding that deciduous fruit is not moving freely. There is only the conclusion that the new rates fixed by the Commission "are necessary *to promote* the freedom of movement by defendants of the specified products of agriculture now affected by existing depression in agriculture."

In the earlier case, *California Growers' & Shippers' Protective League v. Southern Pacific Co.*, 100 I. C. C. 79, the Commission found specifically that deciduous fruits were moving freely in interstate commerce under the existing rates (R. 316), finding:

"The record in this case shows affirmatively that the deciduous fruits here under consideration are moving freely under the present rates, and that the volume of movement has increased greatly during recent years. Complainant's prediction

> that unless lower rates are secured there will be a substantial reduction in tonnage may not be realized. The prediction is based upon the unfavorable financial return to the producers at the time of the hearing, and for a period prior thereto. But this record does not justify the conclusion either that this condition is likely to continue or that it is due in great part to the rate structure. It is suggested in the record that the unfavorable financial results are chargeable in large measure to overproduction, to inability of the eastern market to absorb the supply. If this is so, economic laws, and not the rate adjustment, will sooner or later bring about a reduction in the movement, and such reduction would be desirable."

The earlier case showed the figures only through the year 1923. The movement during the succeeding year was slightly less than in 1923, but the 1925 movement amounted to more than 86,000 cars, 17,000 cars, or over 20% in excess of 1923. The movement in succeeding years was also in excess of the 1923 movement.

The view of the Commission that there is no freedom of movement unless the shipper is making a profit is shown to be in error by the legislative history of the Resolution. In its original form as presented to the Senate, the Resolution provided that rates should be fixed "to the end that commerce may freely move with fair profit to the producer and sold at a reasonable price to the consumer" (S. J. R. 107, as amended in the Senate). The provision "with fair profit to the producer and sold at a reasonable price to the consumer" was eliminated before the Resolution was adopted.

Commissioner McManamy in his dissenting opinion expressed what we consider is the proper construction. He says (R. 64):

> "The report discusses freedom of movement, which is another important requirement of the Hoch-Smith Resolution. * * * In 1916 the total of carload shipments of deciduous fruits from California was 17,891 cars. In 1926 it was 78,803 cars. Of these 9,722 carloads in 1916 and 58,334 carloads in 1926 were grapes. The record shows that each year embargoes were placed on grapes at the principal eastern cities because the supply could not be disposed of and that diversions in search of a market amounted to 1.07 times per car. Surely there is no indication here that freedom of movement has been in any way restricted."

It is submitted that the Commission misconstrued the provision of the resolution respecting "freedom of movement", and that it was in error when it held that there was no freedom of movement notwithstanding the fact that the rates were reasonable, and notwithstanding the fact that there was a continuous and unprecedented increase in the quantities shipped, merely because the shippers were not making a profit. As construed by the Commission, freedom of movement would depend entirely upon the condition of the industry and not upon the fact as to whether cars were actually moving in large and increasing numbers at reasonable rates. It is submitted that this construction is erroneous and the order having been based thereon is invalid.

D. The Commission erroneously construed the Resolution as authorizing it to find without substantial evidence that the existing rate was unreasonable, and that the new rate was the lowest possible lawful rate, and further misconstrued the Resolution as placing upon the carriers the burden of proving that the old rate was the lowest possible lawful rate and that the new rate was lower than the lowest possible lawful rate. The order is arbitrary and invalid since the Resolution does not authorize the Commission to act without substantial evidence and does not alter the existing rule requiring complainant to bear the burden of proof.

As has been shown, the Commission did not attempt to find whether the old rate was reasonable or unreasonable. It considered its duty to be to fix "the lowest possible lawful rate", which it defined to be a rate which in principle must be high enough to cover all of the costs that may fairly be allocated to the service plus at least some margin of profit (R. 26). In the view of the Commission the issue was not whether the old rate was reasonable or was not reasonable; it was rather whether the old rate was the lowest possible lawful rate as defined by the Commission; if it was not the lowest possible lawful rate, it was of the opinion that the old rate must be reduced until it reached that point.

The Commission therefore set itself the task of determining two issues of fact.

First. Is the existing rate the lowest possible lawful rate, as defined by it?

Second. If it is not, what rate is the lowest possible lawful rate?

With such a theory of its obligations and such a visualization of the issue, the Commission assumed

that it was the duty of the carriers to sustain the burden of proof.

To be sure, there was much testimony introduced bearing upon the unreasonableness of the existing rate. Complainant introduced evidence to show it was unreasonable; the carriers to show the contrary. But this evidence was directed to an issue which the Commission considered not the real issue in the case.

The mass of testimony respecting operating conditions, all of which was similar in character to testimony considered in the former case involving these same rates (100 I. C. C. 79) was likewise directed to what the Commission considered an immaterial issue.

The evidence respecting the financial condition of the carriers has already been discussed. It had no bearing upon the issue as to whether these rates were unreasonable. *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541. It furnishes no substantial evidence upon which to find that the new rates were the lowest possible lawful rates but, on the contrary, affirmatively shows that the carriers were not earning the fair return which under Section 15a of the Act it was the Commission's duty to provide through the fixing of reasonable rates. If it be argued that this evidence was directed only to the return on the book value of the carriers' properties, we reply that complainant made no effort to show the value of those properties by any other test and the Commission (R. 53) made no other finding as to the value or the rate of return thereon. If the evidence of the carriers as to their book values is in any way

questionable the record is devoid of any evidence as to the value or rate of return.

The evidence as to the depression in the deciduous fruit industry of California can by no stretch of the imagination determine what is the lowest possible lawful rate even as defined by the Commission.

The Commission (R. 57, 58) specified nine points of distinction between the record in this case and that in the earlier case. As we have shown (*ante* page 38), four of these differences relate exclusively to matters arising under the Resolution. Of the remaining five points, which relate to matters ordinarily considered in connection with the reasonableness of rates, number 4, the willingness of the shippers to submit to an increased minimum weight, and number 5, the increase in volume of movement, would in the absence of other circumstances, be appropriate evidence to consider in support of a reduction in rates. It should be noted, however, that the increase in minimum weight was applicable only to grapes, the other deciduous fruits retaining the old minimum weight of 26,000 pounds. Furthermore the increased minimum on grapes would still leave a lighter average load than in 1922, as appears from finding number 8. As to the increase in volume of movement, it is hardly consistent to rely on this factor in support of a reduced rate which is prescribed as the "lowest possible lawful rate" * * * "to promote the freedom of movement." Moreover, it appears that these rates were originally voluntarily reduced to a low level to assist the industry (R. 28, 37).

The 8th point of difference mentioned by the Commission, the decrease in the average loading of over 3,000 pounds, is a factor which is ordinarily considered to justify an increase in rates as is also the 9th difference, an increase of 61 miles in the average haul. The increase of 61 miles in average haul represents for the 78,803 cars moving in 1926, 4,806,983 additional car-miles of service. The cost of service found by the Commission, as corrected by it (R. 55, 67), averages 14.6¢ per car-mile without taxes or rentals, or an increase to the carriers of $701,819.52 above the cost which would have been incurred for handling the same traffic the average distance that the traffic moved when the former case was decided.

The remaining point of difference between the two cases is in itself unimportant. The fact that "complainant has submitted a more comprehensive rate showing" proves nothing, *Louisville & Nashville R. R. Co. v. U. S.*, 238 U. S. 1. Much of this rate evidence, as will be found by comparison of the Commission's two Reports (R. 16 and 281), was a mere repetition of what was introduced in the former case.

The evidence on the question of rates introduced by the complainant fell under three general heads:

(1) An analysis and comparison of the rates upon fruits and vegetables that move from California to Eastern defined territories;

(2) A comparison of the existing rates with rates upon other perishable traffic in effect throughout the United States; and

(3) A comparison of the relative increases in rate levels on deciduous fruits and other commodities since June 24, 1928.

Rates on fruits and vegetables from California.

The comparison with rates on other fruits and vegetables from California to Eastern points was the same comparison that was made and passed upon in the earlier case before the Commission (Compare R. 29-32 with R. 287-293).

Even apart from the prior finding that these comparisons did not establish the unreasonableness of the rates attacked, the effect of this showing was at best inconclusive. The Commission found, after examining the comparison, that the

> "earnings per car on deciduous fruits are higher than on lemons, materially higher than on fresh vegetables and cantaloupes, but lower than on apples and citrus fruits. Considering the length of haul, the net-ton mile earnings on deciduous fruits are relatively higher than on all the other commodities, while the car-mile and gross-ton mile earnings are higher in some instances and lower in others." (R. 32)

The Commission has held that car-mile or gross ton-mile earnings constitute the fairest test of comparative rates. In view of the direct evidence of the carriers as to the cost of service this comparison indicating that the rates attacked are fairly comparable with the rates on other similar commodities affords no support for a finding that the old rates were unreasonable. This is particularly true in view of the

express finding that the rates on oranges were "not too high" (R. 42).

But, whatever may be said as to the effect of this testimony to indicate the unreasonableness of the old rates, it affords no basis whatever for a finding that the new rates are the lowest possible lawful rates. No evidence was introduced to show whether the rates with which comparison was made were reasonable or were themselves less than the lowest possible lawful rates. The new rates prescribed yield lower earnings than any of the commodities with which comparison is made (R. 31), with the exception of vegetables and cantaloupes, both of which are classified for rate purposes in a lower group than the deciduous fruits here involved.

Rates on bananas and cocoanuts.

Complainant also introduced comparison with the rates on bananas and cocoanuts from gulf ports to various Pacific coast points. These rates applied on imported commodities, which had already borne a transportation charge and were shown to be influenced by water competition. In 1925 11,150 tons of bananas were imported through Los Angeles and San Francisco bay ports alone (R. 34). Such rates are wholly dissimilar in character from domestic rates.

Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197.

While under certain circumstances rate comparisons may have probative value for determining the reasonableness of a rate, such comparisons are of no

value unless the rates compared exist under substantially similar circumstances. Where such circumstances do not exist, comparisons of this character do not furnish substantial evidence of the unreasonableness of a rate.

Smyth v. Ames, 169 U. S. 466, 540;
Louisville & Nashville R. R. Co. v. United States, 238 U. S. 1;
Illinois Cent. R. Co. v. Railroad Commission of Kentucky, 1 Fed. (2nd) 805.

Extension of short-haul rates.

The complainant undertook to extend the various rates on deciduous and other fruits for comparatively short hauls to the transcontinental distance in accordance with a percentage rate of progression employed in another case by the Commission in prescribing a scale on cottonseed cake and meal.

This comparison was in substance rejected by the Commission, which stated (R. 36):

> "The projection of the short-haul rates for comparison with those for longer hauls, regardless of the method used, is not a very satisfactory test."

And (R. 35):

> "Defendants criticize the progression of the scale used in projecting short haul rates, and we think with some merit."

In *Cancellation of Transcontinental Class and Commodity Rates,* 142 I. C. C. 151, 155, the Commission cited its report herein as authority to show that projections of this character were not proper.

Comparison of relative rate levels.

The other evidence introduced by complainant was what is termed "a comparison of relative rate levels". This comparison showed that the rates on deciduous fruits are 50.4% higher than the June 24, 1918 rates, as compared with a comparative increase on 75 commodities moving east-bound of 29% above the June 24, 1918, basis.

The Commission in effect held that this condition did not warrant any reduction of the rates when it said (R. 37):

> "A similar contention was made and answered adversely in *State of Washington v. Director General,* 58 I. C. C. 701, 706."

This comparison was again a repetition of a similar showing made in an earlier case and there found not to warrant any reduction in the rates (compare R. 36-38 with R. 293-295).

Such comparisons furnish no substantial evidence for finding that the deciduous fruit rates are unreasonable. They furnish no evidence upon which the Commission could fix $1.60 as the lowest possible lawful rate. As the Commission pointed out, the comparison is made with a pre-war deciduous fruit rate which happened to be the lowest on record, made so by the voluntary action of the carrier. No evidence was introduced to show that the pre-war rates on the other commodities, with which comparisons have been made, were reasonable or unreasonable. It also appears that the whole relationship between transcontinental rates existing prior to the war and after

the war has been substantially altered by water competition through the Panama Canal and local competition in certain products.

The Commission itself has recognized that evidence of this character is incompetent on the issue of what constitutes the lowest possible lawful rate.

In *State of Colorado v. A. T. & S. F. Ry. Co.*, 147 I. C. C. 201, 212, the Commission says:

> "In their briefs and oral arguments complainants claim the benefits of the Hoch-Smith resolution as entitling them to the lowest lawful rates compatible with the maintenance of adequate transportation service. The records in these cases were not particularly presented so as to show the particular facts establishing a case for relief under that resolution, but were directed to the establishment of reasonable rates according to the usual standards, and to the curing of alleged undue prejudice to complainants and preference of their competitors. Therefore these records afford little basis for the prescription of the lowest possible lawful rates on this traffic."

The carriers' showing.

As compared with the complainant's evidence, we find evidence introduced by the carriers which, in every instance, explains and distinguishes the rate comparison suggested and, in every instance, justifies the reasonableness of the rates attacked.

In addition, the carrier introduced evidence of a persuasive and direct nature as to its actual cost of transporting deciduous fruits. This evidence was accepted by the Commission in its original report, almost without criticism, and in its supple-

mental report is used as the basis for a statement that the new rates will bring in a return slightly exceeding the carriers' operating expenses. As these operating expenses do not include taxes, rental of equipment and joint facilities, it is clear that the existing rates cannot do more than cover the full costs.

The Commission's estimate of the evidence.

This in brief was all the evidence before the Commission other than the evidence respecting the depression in the fruit industry. The Commission's own estimate of the effect and persuasiveness of the evidence is shown in its report (R. 58):

> "Considering the relative rates on and earnings of the deciduous-fruit traffic *in the light of the condition of the industry* and of the service performed by the carriers, and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

The Commission thus definitely set down the factors which it took into consideration in finding that the "present rates are in excess of the lowest possible lawful rates as herein defined". These factors are:

First: The relative rates and earnings of the deciduous fruit traffic in the light of the condition of the industry and the service performed by the carriers; and

Second: The cost study presented by the defendants. (The Conrad Study, R. 482.)

These furnished the factual bases for the Commission's decision. What the first one means is rather difficult to ascertain, and perhaps it was intended to be somewhat vague. The second refers, of course, to the Conrad Cost Study presented by the carriers (R. 482).

In its Report on Further Consideration, the Commission admitted that it had made an error in its computations based on the Conrad Cost Study, of $20.79 per car, and that this amount should have been added to the costs to which it had "given due weight" in arriving at its conclusions. Having admitted its error in its previous consideration of the cost study to which it had "given due weight", the Commission proceeds in its Report on Further Consideration to suggest a few questions respecting the results of the cost study which had not occurred to it when it was laboring under the mistaken belief that the carriers' own cost study furnished substantial evidence that the new rate was above the point of confiscation, and concludes (R. 67):

> "In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

We have, therefore, in the words just quoted, the Commission's own frank characterization of the effect upon it of the evidence.

First: If the carriers' cost study to which the Commission says it had "given due weight" is accepted without question, it would "indicate" that the new rates are slightly above operating expenses; and

Second: it "would confirm the impression" obtained from comparison with other rates that the new rates were "probably" of less than average profitableness, but would still leave the traffic attractive to the carriers.

Instead of finding upon substantial evidence that the old rates were unreasonable, and the new ones reasonable and the lowest possible lawful rates, the Commission fixed the new rates upon the "indication" that they are "slightly" above operating expenses, and upon an "impression" that they "would still leave the traffic attractive to the carriers" although of "less than average profitableness". No law authorizes the Commission to fix rates upon "indications" or upon "impressions". If the Commission must say of the evidence produced before it, that it merely results in an "impression", there is no substantial evidence upon which the Commission can legally act.

The only evidence which had any possible bearing upon what the Commission considered the primary issue in the case was that introduced by the carriers showing the cost incurred by them in the transportation of these deciduous fruits. If this evidence be accepted, as it was by the Commission when it made the order here in controversy, it establishes that the rates prescribed deprive the carriers of the substantial

return to which they are entitled under the Constitution and that the order is therefore void. If this evidence be rejected for any reason, the finding of the Commission that the new rates are the lowest possible lawful rates is wholly without evidence to support it.

Appellees are therefore faced with the dilemma of accepting the cost study introduced by the carriers, which proves the order confiscatory, or of rejecting the cost study and thereby proving that the order is capricious and arbitrary and in excess of the power delegated to the Commission.

The Commission placed the burden of proof on the carriers.

The concluding paragraph of the Report on Further Consideration reads (R. 69):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

To the same effect are the expressions by Commissioner Eastman in his concurring opinion to the original report, and in his dissenting opinion to the Report on Further Consideration. In his separate concurring opinion, he said (R. 59):

> "While it is by no means clear that the rates in issue are unreasonable and ought to be reduced, complainant is entitled under the Hoch-Smith resolution to the benefit of the doubt, and I can for that reason accept the results reached."

In his dissenting opinion in the second report, Commissioner Eastman said (R. 68):

> "When this case was first decided, I was, as I then indicated in a concurring expression, by no means clear that the rates attacked were unreasonable, but gave complainant the benefit of the doubt because of the Hoch-Smith Resolution."

The Commission in fixing the new rate upon the basis of "impressions", and because the carriers had not convinced it that the new rates were below the "lowest possible lawful rates", was not proceeding in accordance with law. Nor was Commissioner Eastman, who in his concurring opinion gave the "benefit of the doubt" to the complainant. The complaint charged that the old rates were in excess of the lowest possible lawful rates. It was incumbent on the complainant to prove that allegation by substantial competent evidence. That could be done even on the Commission's own theory of the meaning of "the lowest possible lawful rate" only by showing the cost of the service. It was not the duty of the carriers to disprove the allegation in advance of some evidence by the complainant in support thereof, and the Commission erred in assuming that the carriers were under the obligation to "convince" it that the prescribed rates were below the irreducible minimum. The burden was not on the carriers; they were not under the duty of "convincing" the Commission. The Commission proceeded upon the legal theory that if the carriers did not sustain the burden of proof, then the Commission was free to fix the rates upon "impres-

sions" gained from the evidence. It is submitted that this finds no support either in the Resolution or the Act.

The Commission itself, a few months before this proceeding was commenced, had found the rates not unreasonable. This fact appeared from complainant's own evidence (R. 281). Under such circumstances the carriers certainly should not be under the burden of proving the rates to be not unreasonably high, or that they were not in excess of the lowest possible lawful rate, as later defined by the Commission.

We have therefore not only an absence of evidence to support the Commission's finding of the new rate as the "lowest possible lawful rate", but we have also an improper placing upon the carriers of the burden of proof.

E. The Commission misconstrued the Resolution in that it held that a rate which yielded the carrier an amount slightly above operating expenses was a lawful rate. The Interstate Commerce Act and the Constitution require that each rate shall yield to the carriers all proper costs and a substantial profit.

The Commission clearly stated (R. 56) that the primary issue before it was whether the existing rate approached the lowest level of the discretion reposed in it by law. It construed the Resolution as directing it to fix, and it deliberately endeavored to ascertain and fix, the lowest possible rate permitted by the Constitution.

As a preliminary to the discussion of the evidence, it expressed its opinion as to the meaning of the

lowest possible rate which it could fix, and stated in clear and unmistakable language that this was the rate which it was obliged to fix. In this connection we find, in the report of the Commission (R. 27) the following:

> "The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between *the minimum charge that can be made for the service and permit the carrier to live,* and the maximum charge that can be borne by the shipper * * *."

It quoted its own prior reports as to the purpose of the Resolution and as to its duty thereunder to fix the lowest possible lawful rate, a rate, so the Commission held, which would yield to the carrier a slight return over operating costs (R. 26).

The Commission, having stated that the lowest limit of its discretion in fixing a rate was one which would return to the carrier some margin of profit, framed the issue thus:

> "* * * whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us." (R. 56)

Its final judgment was that the existing rate was not the lowest possible lawful rate (R. 58). It fixed the new rate as the "lowest possible lawful rate com-

patible with the maintenance of adequate transportation service" (R. 59).

In its Report on Further Consideration (R. 65) the Commission, after admitting an error of $20.79 which it had made in the estimate of certain costs of the carriers for each car in the service involved, concluded that $55.91 would be available at the present rates,

> "for taxes, rental of equipment or joint facilities, and interest, and this difference would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car. In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates *are slightly above the operating expenses* and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers." (R. 67)

The original Report and the Report on Further Consideration thus establish that the Commission believed a rate to be lawful if it returned to the carrier an amount only "slightly above operating expenses". Not only did the Commission express the controlling rule in this form, but it sought to ascertain and fix a rate which would yield to the carriers only a *slight* profit.

It erred in its understanding of the pertinent rule of law. Not only does the Interstate Commerce Act prescribe that rates shall be reasonable, but the carriers are guaranteed by the Constitution the right to establish rates which will yield a *substantial* profit.

The property of the carriers, although dedicated to a public use, is held in private ownership and is subject only to reasonable control and regulation by the Government.

> "The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without *substantial* compensation over its proper cost."
>
> *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 421.

In *Norfolk and Western Ry. Co. v. West Virginia*, 236 U. S. 605, it was sought by governmental regulation to require a carrier to render a service at a rate which would yield but a slight profit. In that case, 97.4203 per cent. of the receipts of the carrier was consumed by expenses incurred in rendering the service. The margin of 2½% was held to be so slight that the court regarded the property of the carrier to have been taken in violation of its constitutional right. The court said, at page 614:

> "It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in the intrastate business. It is clear that by the reduction in rates the company is forced to carry passengers, if not at or below cost, with merely a nominal reward considering the volume of the traffic affected. We find no basis whatever upon which the rate can be sup-

ported, and it must be concluded, in the light of the principles governing the regulation of rates, that the state exceeded its power in imposing it."

In *Northern Pacific Ry. Co. v. North Dakota,* 236 U. S. 585, decided on the same day as *Norfolk & Western Ry. v. West Virginia,* supra, the Supreme Court affirmed the principle that to be reasonable a rate fixed by governmental authority must accord to the carrier a substantial return upon the property devoted to the particular service. The legislature of North Dakota by statute fixed certain maximum intrastate rates. It was sought to justify the statute as a declaration of public policy to aid in the development of a local industry. Mr. Justice Hughes, delivering the opinion of the court, said (598):

> "We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.
>
> "* * * But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or *without substantial compensation* even though the entire traffic to which the rate is applied is taken into account.
>
> "* * * For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate."

See also

> *Interstate Commerce Commission v. Union Pacific R. R. Co.,* 222 U. S. 541, 549.

The Commission in this case failed to observe the principles announced in the cases cited. Its concep-

tion of the applicable law was that its duty was fulfilled if it fixed a rate which would return some profit to the carrier, however slight. If the Commission had properly construed the law and had endeavored to ascertain and fix a rate which would return to the carrier a substantial profit, it seems clear from the report and from its decision in the prior case (100 I. C. C. 79) that the Commission would not have fixed a rate lower than the rate which was attacked in this proceeding.

But whether it be true or not that the Commission regarded the old rate as not inherently unreasonable, the showing that the Commission misconstrued and misapplied the law applicable renders the order invalid. It fixed the new rate by an unwarranted construction of the law. Its error is fundamental and the result is an arbitrary and unjustified rate. Even if this court should conclude that there was evidence which would support the new rate, even if it should be of the opinion that the new rate is not confiscatory, it may not correct the error by itself fixing the rate. Had the Commission been guided by correct legal principles in fixing the new rate, it is impossible to determine what the resultant rate would have been. Obviously it would have fixed a higher rate than it did. The application of a faulty measure of power and duty vitiated the rate fixed beyond the power of a reviewing court to correct, save by annulling the order.

F. The Commission misconstrued the Resolution in that it applied it in an isolated proceeding involving a rate on a particular commodity from a single state, while the Resolution is intended to be applied only in a general investigation into the general rate structure of the country.

There being no enlargement of the Commission's jurisdiction to be found in the Resolution, and the repeated references to "lawful rates" and "lawful changes" obviously referring to the Act, under which the Commission and this Court have held that commercial necessity and the profitableness of an enterprise were immaterial factors in determining the reasonableness of rates, the Resolution can be given effect, consistent with the law, only in the general investigation directed thereby.

With the exception of cases pending before the Commission at the time the Resolution was adopted, as to which particular mention is made in the proviso at the end of the Resolution, the Resolution is directed only to the general comprehensive investigation of the entire rate structure which it orders the Commission to undertake. The express reference in the Resolution to cases pending at the time of its adoption negatives any idea that it was intended to be applied in any proceeding involving a single rate initiated after its adoption. This case was instituted nearly two years later. The Commission, pursuant to the Resolution, initiated a general investigation known as Docket 17000 (R. 518), which is still pending, and application of the Resolution in a proceeding initiated by individual shippers involving a single rate would be wholly inconsistent with the scope of that general investigation.

If the Resolution be considered as prescribing any different standards than existed under the Act it is only in the general investigation that they can be applied in conformity to the twice repeated injunction that any changes be consistent with the maintenance of adequate transportation service. It is only in a general investigation that the conditions "prevailing in our several industries" can be ascertained. It is only in such an investigation that undue advantages given various classes of traffic, or kinds of commodities, or the various localities and parts of the country can be found and corrected. It is only there that the general and comparative levels in market values of the various classes and kinds of commodities can be ascertained and it is only in such an investigation that the Commission could possibly gain the necessary information as to the natural and proper development of the country as a whole. It was in such an investigation, with a more limited scope than directed by the Resolution, that the Commission in 1920 determined what increase to make in rates to fulfill its duties under section 15a, and in 1922, again in attempted compliance with its duties under that section, reduced the general rate level. This is obviously necessary if the Commission is to give any heed to the repeated warning that no rates be prescribed which fail to maintain adequate transportation service.

The evil of attempting to apply a supposed mandate of the Resolution in an isolated proceeding, involving a single rate from one producing district, as

was done here, is manifest. Following the order in this case the producers in Georgia appealed to the Commission under the Resolution and obtained the lowest possible lawful rates (*Georgia Peach Growers Exch. v. A. G. S. R. Co.,* 139 I. C. C. 143, 148 I. C. C. 755). Later came the grape growers of New York and Pennsylvania (*Chautauqua & Erie Grape Growers' Assn. v. Erie R. Co.,* 146 I. C. C. 403) where the reduced rates fixed by the very order here attacked furnished one of the grounds for a reduction in the rates for eastern grapes to eastern markets. Again, fruit growers in the Carolinas appealed to the Commission and relief was granted (*South Carolina Produce Assn. v. A. & R. R. Co.,* 152 I. C. C. 5). Many other cases may be cited where piece-meal reductions for the benefit of single groups of shippers have been afforded. The *Chautauqua & Erie case,* supra, shows the interrelation of rates from various districts to common markets and the competition which requires that reductions granted one district be equalled in another.

In the meantime the general investigation, instituted pursuant to the Resolution (Docket 17000) has been progressing, divided into "Parts" dealing with various commodities. One of the first of those parts to be completed was No. 6, relating to Iron and Steel Products. The report thereon is made in *Rate Structure Investigation, Part 6,* 155 I. C. C. 517, and it was found that no depression exists in that industry, but that many rates were not properly related to each other.

The Commission, to cure the improper relationship found to exist prescribed new rates which Commissioner Woodlock, in a concurring opinion, stated would reduce the carriers' revenues not less than $2,500,000 per year, although "the carriers are not at present earning more than the fair rate of return (prescribed by us) upon anything which can be said to be their fair value" (586).

Application of the Resolution, interpreted as it was by the Commission as authorizing rates less than would otherwise be reasonable, in a single isolated proceeding can only result in a mad scramble for preferences such as has followed the decision in this case, with a resultant steady impairment of the carriers' admittedly inadequate revenues. The results of the investigation so far have led to further decreases in revenues from commodities found to be moving freely and unaffected by depression. No attempt was made in this case to protect the carriers' revenues by a redistribution of charges on other commodities, and such a redistribution is impossible in a proceeding involving but a single rate. The evil consequences of the failure to conform to the plain reading of the Resolution demonstrate the correctness of our interpretation that it was intended to be applied only in the general investigation which it ordered undertaken.

G. The Commission in construing the Resolution as authorizing it to lower rates on deciduous fruits because the industry is in a depressed condition has adopted a new and revolutionary policy in rate making, which is not justified by the provisions of the Resolution, and violates the settled rule of statutory construction that a statute will not be construed to bring about a complete revolution in legislative policy unless it contains clear and definite language demonstrating an intention to effect such result.

Until the passage of the Resolution it was definitely established that under the Interstate Commerce Act, no power was given the Commission to regulate the policy of business, to encourage weak industries and through its rate making power to give aid to those in need. On the contrary as we have demonstrated supra, pp. 73-80, it has been the settled policy of Congress to confine the regulatory authority of the Commission to transportation matters and the Commission was not vested with the power to regulate industrial conditions under the guise of regulating rates. It seems unthinkable that if the Resolution were intended to amend the Act or repeal by implication the limitations therein, by authorizing the Commission to establish rates upon a basis so fundamentally at variance with the established law, such intention would not be clearly and definitely expressed.

As was said by Mr. Chief Justice Marshall in *Post Master General v. Early*, 12 Wheat. 136, 146:

> "That construction which will produce a consequence so directly opposite to the whole spirit of our legislation, ought to be avoided, if it can be avoided, without a total disregard of those

rules by which courts of justice must be governed."

See also the opinion of the court, by Mr. Justice Nelson, in *Wilson v. Rousseau,* 4 How. 646, 678:

"Nothing short of the most fixed and positive terms of a statute could justify an interpretation so repugnant to the whole scope and policy of it, and to wise and judicious legislation."

In *Rosencrans v. United States,* 165 U. S. 257, 262, Mr. Justice Brewer, delivering the opinion of the court, declared:

"* * * where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

In *Ex parte Crow Dog,* 109 U. S. 556, 572, it was held that a clear expression of intention of Congress is required to justify a construction of a statute which would constitute a reversal of a general policy of the government as declared in numerous statutes and treaties and recognized in many decisions of the courts.

The Resolution construed by the Commission as authorizing it to adjust industrial and economic conditions through rate making constitutes a delegation of the most arbitrary discretion to the Commission. It would invest the Commission with the power and duty to decide questions of enormous and unpredictable importance upon grounds of pure policy without even an intimation from Congress of a guiding

principle and without the aid of any knowledge gained from experience, actual or vicarious. Power to determine what industries are needy, which of these should be favored and when they should be favored, in order to promote "a natural and proper development of the country as a whole", subject only to the limitation that the favored treatment be consistent with "the maintenance of an adequate system of transportation", is power to determine the fate of whole communities, industries and classes of society. The welfare of vast sections of the country is thus made to depend upon the action of an administrative commission which is required to follow no rule except what in its mind will effect "a natural and proper development of the country as a whole."

The pernicious effect of such assumption of power by the Commission is thus seen by an impartial student and an outstanding authority on this subject. Professor Gustavus H. Robinson of the Boston University Law School, who in an article entitled, "The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission", 42 Harvard Law Review 610, declared:

> "Yet the usefulness of this greatest of commissions is now threatened. It is being burdened with what seems to be an impossible task under present conditions of private ownership of the railroads and prevalent constitutional ideas; and, in addition, it is being politically coerced in its endeavor to fulfill the new duties assigned to it." (p. 612)

* * * * * * * * *

"Its [the Hoch-Smith Resolution's] language sets no definite rule for the Commission to act upon. Possibly it might have been treated by the latter body as a gesture of no importance other than political. The Commission, however, did not so treat it. On the contrary, it sought, with unfortunate results, to put the Resolution into effect." (p. 619)

* * * * * * * *

"The political record of the Commission's attempt to deal with the mandate in the Hoch-Smith Resolution discloses a crisis in its history. The long and useful career of the Commission, together with an increasing legislative and judicial comprehension of its function, had led many to hope that it had been accepted as a national necessity, and that as an institution it had attained a permanent place in the governmental scheme, comparable in a measure to that of the Supreme Court. To such individuals the aftermath of the Commission's effort to follow the Resolution makes sorrowful reading. Those who believe that the Commission is a necessity if present day regulation is to be effective, view the attempt as imperiling all public regulation in the utility field." (p. 631)

It is well settled that a construction of a statute that would occasion great inconvenience, or produce unjust and deleterious results should be avoided if another, more reasonable, interpretation is possible.

Commercial Credit Co. v. Tait, 2 Fed. (2d), 862, affirmed 7 Fed. (2d) 1022;

Carril v. McCaughn, 30 Fed. (2d) 696;

Braffith v. People of Virgin Islands, 26 Fed. (2d) 646.

A partial list of the factors determining the welfare of particular industries will demonstrate that power to favor depressed industries when it will "promote the natural and proper development of the country" is the most vital and extreme power that has ever been delegated an administrative tribunal in the history of this country. Among the factors in the "economic kaleidoscope" (to use an expression of Commissioner Lane, *In re Advance in Rates—Western Case,* 20 I. C. C. 307) upon which the relative prosperity of industries is dependent are the following: (1) the relative skill, acumen, intelligence and industry of owners and operators; (2) relative wage scales in different sections, labor conditions; (3) relative natural advantages, e. g. soil; climate; absence of hail; locusts; drought; contiguity of elements of product; (4) market conditions, e. g. whether or not flooded by over-production; (5) progress of invention, the shift from one method to another, or of one product to a different one, due to inventions, change in styles or manner of living. The selection from among the foregoing list (which is obviously only partial) of the factors justifying assistance by the Commission at the expense of the more prosperous shippers is as completely a decision of a question of the most fundamental legislative policy as can be imagined. We submit that if there are any limits beyond which power cannot be delegated by Congress to an administrative body these limits are exceeded by the Resolution as interpreted by the Commission.

It is unthinkable that Congress intended such a revolution in legislative policy as that attributed it

by the Commission. As said by Judge Parker in *Anchor Coal Co. v. United States*, 25 Fed. (2d) 462, 474:

"So far as the general language of the resolution is concerned, to the effect that the conditions which prevail in industry should be considered in adjusting freight rates, to the end that commodities may freely move, this is no more than a general declaration that freight rates shall be adjusted in such a way as to provide the country with an adequate system of transportation, *and Congress certainly did not intend by this language to create in the Commission an economic dictatorship over the various sections of the country, with power to kill or make alive.* If the Commission has the right in a rate adjustment to consider the shift in traffic to a community already paying a higher rate, and act upon it as one of the factors in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift in cotton manufacturing, fruit growing, in furniture manufacturing, in short in every branch of industry, will become a matter for consideration by the Commission; for all depend upon freight rates, all have rates in which the differential between long and short hauls is narrow, and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. We feel perfectly certain that Congress did not intend to vest such power in the Commission. And the fact that the Commission seemed to consider that the Hoch-Smith resolution required it to consider or give effect to industrial conditions and the shift of traffic, or at least showed a spirit and purpose in that regard which should be deferred to, is of itself sufficient to invalidate the order

complained of. U. S. v. N. Y. Cent. R. R., 263 U. S. 603, 610, 44 S. Ct. 212, 68 L. Ed. 470."

H. Summary.

We submit that the Commission has miscontrued the Resolution, that it has ignored the plain meaning of the provisions thereof and applied the Resolution in a manner never contemplated by Congress. In concluding this phase of our discussion we desire to summarize briefly the effects of the Commission's construction and application of the Resolution.

1. The Commission has treated the Resolution as repealing by implication Section 1 of the Interstate Commerce Act. Under that section the carriers have been required to establish "just and reasonable" rates and this provision has been interpeted by this court as excluding from consideration the prosperity or adversity of either carrier or shipper but requiring the establishment of rates solely in view of transportation conditions. Under the Resolution, as construed by the Commission, the rates must be the lowest possible lawful rates for industries suffering from depression and the highest possible lawful rates for industries enjoying prosperity, regardless of whether the prosperity or adversity is in any way caused by or reflected in, transportation.

In the application of the Resolution the Commission has said that as to industries enjoying prosperity it should prescribe rates "approaching but not exceeding reasonable maxima". This is merely the power to which the Commission is limited by the Act itself. All that the Commission can do under the Act is prescribe

maximum reasonable rates to protect the public against extortion. We are not unmindful of the minimum rate power granted the Commission in 1920, but this is in aid of the power to prevent ruinous rate wars, the dissipation of revenues by unwarranted favoring of particular industries or to preserve relationships found reasonable. The prescription of minimum rates necessarily implies that the carriers may lawfully publish higher rates, but that is specifically prohibited by the order in this case. It is patent, therefore, that the Commission construes the Resolution as changing section 1, so that instead of *all* rates being just and reasonable, two standards are to be applied. Agriculture suffering from depression shall have the lowest possible lawful rates, while other commodities shall have rates fixed by the application of that "discretion which belongs to the power to fix rates" on the basis of either the maximum reasonable rate mentioned in the Act, or something higher. It is immaterial whether the Commission construes the Resolution as authorizing higher rates than would otherwise be applied to prosperous industries; the important thing is that the Commission construes the Resolution as creating two standards of reasonableness where the Act, in section 1, provides a single standard.

2. The Commission reads an implied repeal of section 3 of the Act into the Resolution. That section prohibits discrimination between commodities or localities. In this very case the Commission created such discriminations; e. g., in ordering a reduction of

the deciduous fruit rates because of the unprosperous condition of the producers, notwithstanding its finding that these rates were more favorable to the shippers than the orange rates (R. 32) which were found to be "not too high" (R. 42). Here competing commodities, produced in the same region, transported under similar circumstances, have rates judged by different standards, fixed at different amounts, and the discriminations prohibited by the Act created, solely because the grape growers and other deciduous fruit producers, through overproduction and disorganized marketing and the extensive use of unsuitable, marginal lands, are unable to enjoy the prosperity that a better organized and better conducted industry had been able to attain through the elimination of such uneconomic conditions.

3. The Commission has read and applied the Resolution as repealing by implication section 15 of the Act, under which the Commission's power to change rates fixed by the carriers was limited to those cases where it found the rates so fixed to be unreasonable. It treats the Resolution as authorizing the change of rates wherever they are not the lowest possible lawful rates, defined by it to be rates yielding a slight profit above operating expenses, in cases where the industry, from any cause whatever, is not prosperous. This implied extension of power, too, is to be exercised only for the benefit of certain classes whereas the Act purports to set up a uniform rule to be applied to all alike.

In this connection it should be noted that subsequent to the adoption of the Resolution, Congress, in 1927, amended subdivision 7 of section 15, dealing with the Commission's power of suspension of new rates fixed by the carriers. In so doing, Congress repeated the words formerly contained in the Act, and granted the power of suspension only where the Commission was of the opinion that the new rates might be "unjust or unreasonable". The failure to grant a power of suspension where the newly published rates were not "the lowest possible lawful rates" is persuasive that Congress intended the Resolution to be no enlargement of the Commission's powers as contained in the Act.

4. The Commission construes and applies the Resolution as an implied repeal of section 15a of the Act. While in an earlier proceeding it professed a contrary understanding, in this and subsequent proceedings it has treated the Resolution as authorizing the reduction of any rates on agricultural products suffering from depression where such rates were not the lowest possible lawful rates, as defined by it, whether such rates were reasonable under the Act or not, and despite the admitted fact that the carriers as a whole had signally failed to attain the fair return, fixed by the Commission itself, under rates which it had itself prescribed or authorized. This section imposes an affirmative and continuing duty on the Commission "in the exercise of its power to prescribe reasonable rates". In the absence of an express finding on independent grounds that existing rates are unreasonable under standards

prescribed by the Act, as interpreted by this Court, any reduction of such rates can be justified only on the theory that the Resolution, without any expressed intent so to do, and despite the inclusion therein of words almost identical with those used in section 15a, impliedly repealed that section.

The fundamental principles of the Act, prior to 1920, were the requirements that rates be just and reasonable, to shipper and carrier alike, and that they be uniform in application to all whose traffic was transported under similar circumstances. A fundamental principle of the Transportation Act, 1920 was the affirmative duty imposed on the Commission to insure the preservation of an adequate transportation system by the fixing of rates which would provide a fair return on the value of the property devoted to that important public service. If Congress intended a revolutionary change of these long established and fundamental principles a clear declaration to that effect would naturally be expected. No such intent is stated in the words of the Resolution. Its language is not only consistent with, but requires a contrary interpretation. The Commission has attained its conclusions by implications which do not properly flow from the language employed, contained in a joint resolution addressed only to the Commission and not to the entire nation. Even if such implications naturally existed they would not be favored, if any other interpretation could be given the enactment, since an implied repeal of an established code of law, such as

the Interstate Commerce Act, is never to be favored. There must be a clear and unequivocal expression of the legislative intent to change the law, otherwise the new enactment will be given a construction consistent with the body of law to which it relates. The rule in this regard is stated by Mr. Justice Van Devanter, in *United States v. Barnes,* 222 U. S. 513, 520, as follows:

> "Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

II. The Resolution should, if possible, be interpreted in such a manner as will avoid doubts as to its constitutionality. If construed as authorizing and directing lower rates than would otherwise be prescribed solely because of a depression in a given industry and the inability of shippers to conduct their business at a profit, as was done by the Commission in this case, it would be unconstitutional; (1) as a deprivation of the use of private property, transcending the power to regulate interstate commerce; and (2) as being a regulation of industry and not a regulation of commerce.

The Commission, in this case, construed the Resolution as authorizing it to reduce a reasonable rate merely because the deciduous fruit growers in California were suffering from depression. So construed, the Resolution is open to serious constitutional objections. If that construction be proper, the Resolution

would go far beyond the permitted scope of regulation and deprive the carriers of the use of their private property without just compensation or due process of law. It would also be in excess of the powers delegated to Congress itself and therefore incapable of delegation to the Commission, being a regulation of industry and not a regulation of commerce.

A. Where doubts as to constitutional power are raised by one construction of a statute, the court should, if possible, construe it so as to avoid the constitutional question.

In the interpretation of a statute not only should that interpretation be preferred which is consonant with the requirements of the Constitution, but in addition any interpretation which would lead to serious doubts as to the constitutionality of the enactment should be avoided. As stated by Mr. Justice Holmes in *Harriman v. Interstate Commerce Commission,* 211 U. S. 407, 422, it is the duty of the court

> "to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits."

The rule was applied in connection with the provisions of the Transportation Act, 1920, under which the Commission has issued an order permitting the abandonment of a certain line of railroad. In *Texas v. Eastern Texas R. R. Co.,* 258 U. S. 204, 217, Mr. Justice Van Devanter, speaking for the court said:

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the aban-

donment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' (*United States v. Delaware and Hudson Company,* 213 U. S. 366, 407-408.)

"Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain some broad language, but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described * * *. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of congress over interstate and foreign commerce. *Minnesota Rate Case,* 230 U. S. 352, 418; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared."

See also:

The Abby Dodge, 223 U. S. 166, 175;
United States v. Delaware and Hudson Company, 213 U. S. 366, 407;
Knights Templars' & Masons' Life Indemnity Company v. Jarman, 187 U. S. 197, 205;
McCullough v. Virginia, 172 U. S. 102, 112;
United States v. Coombs, 12 Pet. 72, 76.

The present case presents a situation requiring the application of these principles. Interpreted as a mandate to undertake a complete investigation of the rate structure of the country, as a direction to revise that rate structure in accordance with existing law, as a direction to do away with the injustices and inequalities that had grown up by reason of its unscientific, piecemeal growth, and in the course of that investigation to give consideration to changes in the relative value of commodities and in the volume of movement thereof, and to give first consideration to any illegalities found in the rates on agricultural products, the Resolution presents no constitutional difficulties.

Interpreted as requiring a different standard of rate making in the case of agricultural products suffering from depression than is applied to other commodities, the Resolution is subject to a succession of constitutional difficulties. So interpreted the Resolution would interfere with the use of the carriers' private property to an extent not permitted by the power of regulation and would compel the carriers to extend to

the public the use of their facilities on terms not contemplated by the original dedication of their property to the service of carriage. It would also amount to a regulation of industrial conditions rather than a regulation of commerce, a power not delegated to Congress itself by the Constitution and therefore incapable of delegation to the Commission.

B. As interpreted by the Commission the Resolution would exceed the proper scope of regulation and be an unconstitutional invasion of the carriers' rights to manage and enjoy their private property.

In any discussion of the power of Congress to regulate the affairs of the carriers it must be kept in mind from the outset that despite the dedication of their property to a public use, thereby subjecting it to certain restrictions and regulation, the railroads are private property, and the power of the government extends only to the protection of the public in its dealings with the carriers. By reason of the private character of the property involved, the power of regulation does not extend to an unlimited interference with the use thereof, based on considerations of general welfare. Subject only to such restraints as may be imposed to protect the public against extortion or discrimination, the railroads are free to adopt their own policies and to manage their own properties in such a manner as to them seems expedient. In the regulation of the carriers the legislature has not the freedom to act on grounds of general welfare or public policy that it has in respect of the Post Office Department or other governmental activities.

Thus, in *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 118, the court, by Mr. Justice Brewer, declared:

> "It must be remembered that the railroads are the private property of their owners; that while, from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595, the court, by Mr. Justice Hughes, declared:

> "The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions on which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.
>
> "But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. *The fact that the property is devoted to a public use*

on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement * * *."

See also,

Great Northern R. Co. v. Minnesota, 238 U. S. 340;

Chicago, Milwaukee & St. Paul R. Co. v. Wisconsin, 238 U. S. 491;

Missouri Pacific R. R. v. Nebraska, 164 U. S. 403, 415;

Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 608.

In *Lake Shore and Michigan Southern Railway Co. v. Smith,* 173 U. S. 684, there was before the court for consideration a statute of Michigan requiring the sale of 1,000 mile scrip books for use within the state at a rate of 2¢ per mile. The legislature had previously prescribed a maximum fare of 3¢ per mile. The question, as the court saw it in that case, is similar in

all essential respects to the question before the court in the instant case (p. 690):

"The question is presented in this case whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

"* * * We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able

to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. *It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.* * * *"

The extent of the power of regulation was stated to be (p. 692):

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. * * *"

The evil consequences of such discriminatory legislation were pointed out (p. 694):

"If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed

to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations."

The court showed that such legislation deprived the carrier of property rights contrary to constitutional guarantees, saying (p. 696):

"The legislature having fixed a maximum rate at what must be presumed, *prima facie,* to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. *If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law.* The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not, is

not a matter of policy to be decided by the legislature. *It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction.*" (pp. 694-7)

The right of the carrier, as owner of private property to do things which it could not lawfully be compelled to do was recognized in these words (p. 697):

"It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

The discussion was concluded with this statement (p. 698):

"In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or ille-

gal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason. Whether the legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time, is not a question which is now before us, and we need not express any opinion in regard to it." (pp. 698-9)

Although this case arose under the Fourteenth Amendment, the reasoning is equally appropriate to the similar language of the due process clause in the Fifth Amendment.

Block v. Hirsch, 256 U. S. 135, 159;
Hibben v. Smith, 191 U. S. 310, 325, 326.

It is true that in the exercise of the power of regulation judgment may be exercised and the same level of rates need not be prescribed for all commodities without regard to their bulk, hazard, value or other transportation characteristics, but this does not impair the reasoning of the decision that the legislature may not discriminate in favor of one class of

users of the railway property as against another, merely for reasons of claimed public policy and apart from recognized distinctions based on transportation matters.

The scope of the decision in *Lake Shore and Michigan Southern Ry. Co. v. Smith, supra,* was limited in *Pennsylvania R. R. v. Towers,* 245 U. S. 6, to the extent that it might be deemed inconsistent with the rule recognizing the right of reasonable classification, but it was cited in the unanimous decision of this court, by Mr. Justice Holmes, in *United States v. New York Central R. R. Co.,* 263 U. S. 603, as illustrating the constitutional difficulties which might ensue from the Commission's interpretation of an Act of Congress requiring the issuance of mileage books or scrip tickets.

The undertaking of the carriers is limited to the transportation of commodities at reasonable rates and without discrimination. They have not dedicated their properties to the upbuilding of local industries. The limit of regulation is reached when the government enacts laws prescribing reasonable rates and preventing discrimination. Of course adequate facilities may be required, and it is recognized that the various kinds of traffic may be classified according to their transportation characteristics, but this does not warrant the prescription of a different and lower standard of rates than is applied generally, merely to benefit certain selected industries or to effect a general public purpose. If the production of grapes and other deciduous fruits in Cal-

ifornia is of sufficient consequence to the "natural and proper development of the country as a whole", and if that industry, due to overproduction or other uneconomic practices, is not self-supporting, the bounty must come from the general treasury rather than from the earnings of the carriers.

It would not strengthen the position of Appellees to contend that the carriers will not be injured because they may be permitted to recoup the loss from deciduous fruits through higher rates on other commodities than would otherwise be permitted. Up to date the Commission has made no effort to replace the $2,700,000 revenue taken from the carriers for the benefit of the fruit growers. Should it attempt to do so the shippers of other commodities could properly insist on their own right to reasonable rates, determined by the cost and value of the service given them. The Commission could not lawfully burden the shippers of other commodities with charges higher than they would otherwise be required to pay in order that the California grape growers might be relieved of a portion of the charges properly apportionable to their traffic, and thereby be enabled to recoup some of the losses sustained from the inevitable operation of economic laws.

In *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S. 585, it was contended that the public policy of encouraging the lignite coal industry justified low rates and that the carriers were not hurt because they were permitted to earn a fair return from their

total traffic, but this court disposed of the contention as follows (p. 598):

> "But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carriers' undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable."

In *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, the recapture provisions of the Transportation Act, 1920 were sustained, and it was held that the shippers could not complain of rates which, while providing more than a fair return for an individual carrier, were necessary to maintain adequate transportation service for the entire group of carriers. In so holding the court recognized that the

shipper was concerned not only with the carrier transporting a given shipment but with the entire system of railroads which were available for his service. So far as the shippers were concerned, the effect of the Act was to treat the entire group of carriers as if they were owned by a single corporation. The private character of the carriers' earnings was recognized, but it was held that as to recapturable income the carrier had received it only in trust for the benefit of the general transportation system. But the decision that the shipper might be called upon to pay rates sufficient to provide a fair return for the carriers as a whole in a particular group is no authority for the proposition that one shipper may be called upon to pay rates higher than required for that purpose in order that other shippers might be relieved of all or a part of that burden, particularly where the only reason for such discrimination is that the favored class of shippers have been less successful in the conduct of their business. If, instead of being devoted to the upbuilding of the transportation system, the recaptured income involved in the *Dayton-Goose Creek case* had been taken to provide free transportation to all persons desiring to ride on that line but not possessing the necessary fare, would the imposition of such excess charges have been upheld?

This court has condemned legislation taking private property for the purpose of giving bounties to private industry. In *Loan Association v. Topeka,* 20 Wall. 655, Justice Miller, in delivering the opinion of the court declared (p. 664):

> "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

And again, referring to the claim that the encouragement of business redounds to the benefit of the people taxed, he said (p. 665):

> "* * * If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizen by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

The evils pointed out in *Loan Association v. Topeka*, supra, would be equally apparent if the Resolution be construed as requiring a reduction of rates below what would otherwise be considered reasonable in order that the production of deciduous fruits might be conducted with greater profit. If the taxes paid by the carriers cannot lawfully be devoted to the payment of bounties to distressed industries, how can they be required to accept less than reasonable rates in order that such industries may be made more profitable? In the first case the taxes are levied on all taxpayers alike,

but in the second case the carriers alone are required to pay the subsidy. As said by Mr. Justice Miller, "This is not legislation. It is a decree under legislative forms."

Under our constitutional system, the sovereign power does not extend to the taking of property lawfully owned, or the lawful profits of property, from one person or group of persons for the advantage of other persons or groups. The imposition upon carriers of the burden of promoting the general welfare is unlike the operation of the post office or other governmental activity, carried on for the public, where deficits may be made good from taxation or other revenues in the public treasury. Those ultimately pay who share the convenience. Even the "common benefit" to the whole community may not be served "at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss in order that others may make gain." (Brewer, J., in *Reagan v. Farmers' Loan and Trust Company,* 154 U. S. 362, 410.)

C. The power of Congress under the commerce clause does not extend to the regulation of industrial conditions under the guise of regulating rates, and such power could not be delegated by Congress to the Commission.

It is a commonplace of constitutional law that production is not commerce, that the latter word has to deal with buying, selling or transporting goods, not with making, growing or mining them.

In *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 407, Chief Justice Taft said:

> "Coal mining is not interstate commerce and the power of Congress does not extend to its regulation as such."

Neither mining nor manufacturing is interstate commerce, and

> "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements and persists even though the business be conducted in close connection with interstate commerce."
>
> *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 178 (by Van Devanter, J.).

See also:

> *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129, 136;
>
> *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 148-152.

The fact that Congress cannot under the guise of regulating commerce attempt to control production, or other industrial conditions, was clearly recognized in *Hammer v. Dagenhart*, 247 U. S. 251, where a statute regulating the transportation of the products of child labor was held unconstitutional. Mr. Justice Day said in that case (pp. 271-272):

> "The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. * * *

"Commerce 'consists of intercourse and traffic * * * and includes transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. Delaware Lackawana & Western R. R. Co. v. Yurkonis, 238 U. S. 439.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.

" 'When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.' (Mr. Justice Jackson in *In re Greene,* 52 Fed. Rep. 113.) This principle has been recognized often in this court. Coe v. Errol, 116 U. S. 517; Bacon v. Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. Kidd v. Pearson, 128 U. S. 1, 21."

And somewhat later in the opinion it is declared (p. 273):

"The grant of power to Congress over the subject of interstate commerce was to enable it to

regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture."

In conclusion the court says (p. 276):

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

In *Anchor Coal Co. v. United States*, 25 Fed. (2d) 462, where an order of the Commission was attacked on grounds similar to those here involved, the court said (p. 472):

"As pointed out above, for the Commission to fix rates upon such a basis is for it to assume the task of equalizing industrial conditions through rate adjustments. We do not think that Congress could give such power to the Commission. *Hammer v. Dagenhart*, 247 U. S. 251. * * * We are perfectly certain that it has not attempted to do so. [The Court then discusses the powers of the

Commission under various statutes.] * * * But nowhere is it provided that in doing so the Commission may prefer one section of the country over another, or that it may fix rates, or may prevent the fixing of rates by the carriers, with a view of placing competing producers upon an equality or of compensating for disadvantages under which competing communities may labor. Manifestly such a power is not conferred by the statutes referred to, for rates fixed with such an end in view are not 'reasonable' but are unreasonable and constitute an unprecedented interference with the industrial conditions of the country."

See also

United States v. E. C. Knight Company, 156 U. S. 1, 12, 13, 34.

Kidd v. Pearson, 128 U. S. 1, 20-22;

Coe v. Errol, 116 U. S. 517, 525;

Veazie v. Moor, 14 How. 568, 574.

In *Heisler v. Thomas Colliery Company,* 260 U. S. 245, exemption from state taxation was claimed for anthracite coal mined in Pennsylvania, on the ground that the state tax was a burden on interstate commerce. Justice McKenna, in rejecting this contention, said (p. 259):

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as

> they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

The "federal commercial control", which the court rejected in the *Heisler case,* the Commission has adopted in the present case. Reducing transportation rates on their products to encourage the business of the deciduous fruit growers at the expense of the railroads has as little justification as granting an exemption from state taxation of such products under the commerce clause.

It is well established that Congress cannot seek to attain a forbidden end through the exercise of a permitted power. As stated by Mr. Justice McReynolds, in *Linder v. United States,* 268 U. S. 5, 17:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely

to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced * * *."

See also the opinion of the court, by Mr. Chief Justice Taft, in the *Child Labor Tax Case*, 259 U. S. 20, 37-38:

> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

See also,

Hill v. Wallace, 259 U. S. 44, and the dissenting opinion of Mr. Justice Sutherland (with whom concurred Justices McReynolds, Butler and Stone) in *Lambert v. Yellowley*, 272 U. S. 581, 597.

Building up the deciduous fruit industry in California under the guise of regulating interstate commerce is as clearly beyond the power of Congress as the attempt to regulate industry under the guise of taxation condemned in the *Child Labor Tax Case.* That Congress is likewise unable to use its power over interstate commerce for "the accomplishment of objects not intrusted to the Federal government" is expressly recognized by the Court in the *Child Labor Tax Case.* In referring to *Hammer v. Dagenhart,* 247 U. S. 251, Chief Justice Taft says (p. 38):

> "The analogy to the *Dagenhart Case* is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of State concerns and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires as did the *Dagenhart Case* the application of the principle announced by Chief Justice Marshall in *McCullough v. Maryland,* 4 Wheat. 316, 423, in a much quoted passage:
>
> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under

> the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.' "

If the control of the operations involved in the processes of manufacture is beyond the power of Congress, under the grant in the commerce clause, it must equally follow that the granting of special privileges to certain industries or productive activities is equally outside the power to regulate commerce. To be sure, the legislative power may in the regulation of commerce fix rates for transportation that are just and reasonable; it may prevent discrimination; it may assume a control over transportation, the limits of which are not precisely fixed, but which permit it wide discretion. Where the roads are privately owned, the right of the carrier to his earnings and to the enjoyment of the advantages which he possesses cannot be wrested from him by a direction of the government that he should not continue to receive reasonable rates for his service, merely because it is deemed to be in the public interest to encourage certain industries by giving them lower rates.

The Commission in construing the Resolution as authorizing it to reduce a reasonable rate in order to help the deciduous fruit growers in California has imposed a burden upon particular carriers for the benefit of a particular industry in a particular section of the United States. The equality that necessarily prevails in taxation is set aside and the car-

riers are required to contribute several million dollars annually to the deciduous fruit growers. There is no express power granted to Congress to enact legislation so drastic in its interference with property rights, or so subversive of fundamental principles of equality, and the power cannot be implied from the power to regulate commerce nor exercised under the guise of that power.

Though it has been held that the grant of the power to regulate commerce may include the power to prohibit the transportation of harmful things, like lottery tickets, it has never been held that it authorizes the granting of what are in effect bounties to industries needing encouragement.

In *Adair v. United States,* 208 U. S. 161, the court said, "The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed". But in order that the rule may be justified under the grant in the commerce clause, there must be "a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object" (p. 177).

> "Any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated." (p. 178)

In that case, notwithstanding "that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress" (p. 190), the Erd-

man Act, forbidding, under penalities, a carrier engaged in interstate commerce from discharging an employee because of his membership in a labor union, was held to be beyond the power of Congress to enact.

Though the "affirmative power of Congress in developing interstate commerce agencies is clear" (Taft, C. J. in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy RR. Co.*, 257 U. S. 563, 590) and though "the authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on" (Hughes, J., in *The Minnesota Rate cases*, 230 U. S. 352, 399), it has never been supposed that its power extends to establishing a system of bounties for "distressed industries", or to reach into the states for the purpose of encouraging business that thereby interstate commerce may perhaps ultimately be increased.

The Commission, in reading into the Resolution a mandate to reduce reasonable rates for the benefit of agricultural products suffering from depression, not only departed from the plain meaning of the terms used in the Resolution but attributed to Congress a purpose which, if it existed, would be plainly in excess of the powers of Congress itself. Those powers, so far as the question here involved is concerned, are to be found only in the Commerce Clause. It has been held by this court, in unmistakable terms, that the power to regulate commerce does not extend to the regulation of industrial conditions, of production, mining, or manufacture. The new standard of rates

which the Commission construed the Resolution to require was dependent wholly on industrial conditions, the prosperity or adversity of the industry, and had no relation whatsoever to commerce. This would transcend the power of Congress itself to as great a degree as the attempt to regulate the employment of child labor, and, as shown by the cases we have discussed, an attempt to exercise such a power cannot be sustained by the pretext of regulating commerce. As held in *Hammer v. Dagenhart,* supra, Congress could not prohibit the transportation of the products of child labor. It is evident that it could not have required the carriers to charge more than a reasonable rate for such transportation. Here a lower rate than would otherwise be prescribed is required in order that the grower of deciduous fruit may attain greater prosperity. The object sought is not within the specifically enumerated powers given Congress by the Constitution, and not being possessed by Congress, it is incapable of delegation to its agent, the Commission.

The language of the Resolution requires no such construction. Its legislative history shows that no such purpose was entertained by Congress. It is the settled rule of this court to avoid any construction of a statute which would render it unconstitutional or even create grave doubts as to its constitutionality, unless the statute admits of no other possible interpretation. We submit that the construction placed upon the Resolution by the Commission, a construction which would make the Resolution effect

a fundamental change in the whole rate-regulating policy of the nation, and which if correct would render the Resolution unconstitutional, was erroneous. The Commission having misconstrued the law applicable, the order based on such misconstruction is void.

III. The rate fixed is confiscatory and violates the Interstate Commerce Act and the Constitution. The Commission intended to fix a rate that would not yield a substantial return, and did, in fact, fix a rate which does not cover the carriers' costs or yield a substantial return.

The new rates fixed by the Commission are confiscatory. They not only do not yield the carrier a substantial return over all proper costs, but such costs will actually exceed revenues by not less than $2.99 per car. If this contention is proved, the order is, of course, void, for the Commission and Congress are without power to deprive the carriers of their property by fixing confiscatory rates.

The petition alleges that the carriers' costs will amount on the average to not less than $470.06 for each car transported, while the average revenue under the new rate will not exceed $467.07 per car, thus leaving a deficit of not less than $2.99 per car (R. 9). The new rates, it is alleged, will entail an actual loss to the carriers of more than $240,000 per annum, and will not allow for any profit (R. 9). In its answer, the Intervener denies that the average cost is $470.06 per car as alleged by the carriers, and alleges that the average revenue will be $480 per car (R. 89). Issues of fact, both as to revenue and as to cost, are thus raised which must be judicially reviewed. It is sub-

mitted that the uncontradicted evidence before the Commission shows that the rate is confiscatory, and that the findings of the Commission in its report sustain the carriers' contention.

A. A rate is confiscatory unless it allows the Carrier a substantial profit.

The Commission, in interpreting the requirement of the Resolution that the rates fixed shall be "lawful", stated that a "lawful" rate was one which "in principle" must be high enough to cover all the costs that may fairly be allocated to the service, plus at least some margin of profit (R. 26). From this interpretation, as well as an examination of the report as a whole, it is evident that the Commission considered a rate lawful, and not confiscatory, if it produced "slightly above the operating expenses" (R. 67).

This construction is erroneous. Rates which produce revenue only slightly in excess of the operating expenses are confiscatory and void.

The carriers are entitled to rates which will yield them their costs of service and substantial compensation in addition.

> "The state is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper costs."
>
> *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 421.

See also

Vandalia RR. Co. v. Schnull, 255 U. S. 113.

In *Norfolk and Western Ry. Co. v. West Virginia*, 236 U. S. 605, 614, Mr. Justice Hughes, in an opinion holding void a passenger rate of 2¢ per mile fixed by an act of the West Virginia Legislature said:

> "It is apparent, from every point of view that this record permits, that the statutory rate at most affords a very narrow margin over the cost of the traffic. It is manifestly not a case where substantial compensation is permitted and where we are asked to enter the domain of the legislative discretion; nor is it one in which it is necessary to determine the value of the property employed in intrastate business."

The view at one time urged, that if a rate returned the carrier the out-of-pocket operating expenses, incident to the particular traffic, it was not confiscatory, if the carrier earned a reasonable return upon its property as a whole, has been definitely overruled. It is well settled that each rate must yield not only the out-of-pocket costs incurred by the particular traffic, but a just proportion of the expenses incurred for all traffic of which it forms a part, and in addition yield a substantial profit.

As was said in the *Banton case* (*Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 421), the cost of service

> "includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part."

In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 597, the correct rule is stated by Mr. Justice Hughes to be:

"The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned."

To escape being confiscatory, therefore, a rate must pay all direct costs, a reasonable apportionment of all general costs, and in addition a substantial profit.

While it is indisputable that a carrier is entitled to earn a substantial return on each rate in excess of all proper costs, the carrier is not entitled to earn exactly the same percentage of return on all the various classes of traffic. The "substantial return" for one class may be less in proportion than the "substantial return" required on another class of traffic. Depending upon various considerations, such as the value of the service to the shipper, the value of the product carried, and other factors, the rate of return on one class of traffic may be less or greater than on others, provided always that the rate yields to the carrier a substantial return in excess of all proper costs.

But a rate may not be reduced below the point where it will return a substantial profit, even though the State or a regulatory body may consider it sound public policy to do so. *Northern Pacific v. North Dakota,* (supra).

These principles, applied to the instant case, require that the rates for agricultural products, including deciduous fruits, must be reasonable rates and must return a substantial profit. The fact that the agricultural industry may be suffering from depression, or that Congress may consider as a matter of public

policy that the rates on agricultural products should be reduced, does not authorize a reduction to a point where the rates fail to yield a substantial return over all proper costs of the particular traffic. It cannot because of public policy, fix a "slightly remunerative" rate, or one yielding "slightly in excess of operating expenses", on the theory that the loss of profit to the carrier may be made up in higher rates on the products of the forest or of the mine. The losses caused by a rate yielding less than a fair return may not be shifted over to other industries to increase their rates beyond what is reasonable.

B. Scope of examination by this Court.

Where, as here, an order fixing rates is attacked as confiscatory, the carriers are entitled, under the due process clause, "to the independent judgment of the court as to both law and facts."

Bluefield W. W. & I. Co. v. Public Service Commission, 262 U. S. 679, 689;

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289.

See, also:

Northern Pacific Ry. Co. v. Department of Public Works, State of Washington, 268 U. S. 39;

Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission, 274 U. S. 344.

The court is called upon by these decisions to examine independently the evidence introduced before

the Commission, and to make its judgment upon those facts, in exactly the same way that a court of equity passes upon facts presented to it in an ordinary suit. It must find in accordance with the weight of the evidence. In this case the task is not difficult, since the report of the Commission shows not only that the rate is confiscatory, but also the misinterpretation of the law and the error in computation by the Commission which caused the fixing of the confiscatory rate.

C. The evidence of confiscation.

The petition alleges that the rates are confiscatory, and in support of this allegation set forth the following (R. 11):

The average revenue per car under the new rates, using the highest rates prescribed in the order, and allowing for the increased minimum weight on grapes permitted thereby, will not exceed	$467.07
The total average operating expenses and taxes per car (without allowing any profit) will be not less than	470.06
The loss per car (without allowing any profit) will be not less than	2.99
On the basis of an annual movement of approximately 80,000 cars, the actual yearly loss (without allowing any profit) will be not less than	240,000.00
The yearly loss in revenue resulting from the new rates will be not less than	2,700,000.00

The petition also shows by appropriate allegation what the cost of not less than $470.06 represents (R. 9). It represents an average operating expense per car, exclusive of taxes and rental of joint facilities, of not less than..$433.68.

It represents taxes, amounting to 8.39% of $433.68, or ..... 36.38.

(This percentage of tax is derived from Exhibit 204 (R. 458) and represents the ratio which taxes bore to operating expenses for the year 1926 for all the railroads in the western district, including the Illinois Central and five principal railroads in the eastern district.)

Or total costs in excess of..... $470.06.

These specific allegations are supported by the uncontradicted evidence presented to the Commission.

It is not often in rate proceedings involving a single commodity that the carriers are able to produce accurate cost records. In this case, however, a cost study covering this particular class of traffic was available and was presented to the Commission. This study (the Conrad study) was accepted by the Commission. The report says (R. 54): "The methods employed in reaching the results seems to be satisfactory." In reaching its conclusion that the old rates were in excess of the lowest possible rates as defined by it, the Commission predicated its conclusion thereon, at least in part. The study was not contradicted by any other evidence of costs. It is upon that study that the allegations of confiscation above set forth are based.

D. The revenues to be expected under the new rates.

The Intervener, California Growers' & Shippers' Protective League, in its answer alleged that the average revenue per car under the new rates will be $480 per annum, instead of the $467.07 alleged by the carriers. The Intervener alleged (R. 89) "that said new rates will produce an average revenue, using the highest rates prescribed in the said order and allowing for the increased minimum weight on grapes permitted thereby, to the carriers approximating $480 per car", and again the Intervener alleges (R. 95) "that the evidence adduced before the Commission shows * * * the authorized increase in the carload minimum weight applicable to shipments of grapes from 26,000 pounds to 30,000 pounds will be followed by an increase in the average load of grapes in an amount somewhat in excess of 30,000 pounds per car, and that such increase in the loading will necessarily substantially increase the average revenue per car."

In the first place it is impossible that the new rate, even with an increase in the average load of grapes to an amount in excess of 30,000 pounds per car, will "necessarily substantially increase the average revenue per car". Intervener forgets that the rates have been reduced. The present average revenue per car is $489.42 as found by the Commission (R. 31). The highest revenue that Intervener even dares to allege is $480.00, a decrease of $9.42 in average revenue per car, instead of the "substantial increase" which Intervener alleges must necessarily follow.

In the second place, while the decreased rates apply to all deciduous fruit traffic,—the increased minimum in car loading applies only to grapes (R. 59).

The question as to what the revenue under the new rates will be is one of fact to be decided by this court. But it is illuminating to see what the Commission thought on the question of what the average loading would be under the new minimum, in view of the Intervener's allegation.

In its Report the Commission says (R. 39):

> "Complainant contends that there has been an increase in the average loading per car, but excluding abnormal years, the loading figures have not changed materially in recent years. * * * Complainant predicts that with an increase in the minimum on grapes to 30,000 pounds, the resultant average load of all deciduous fruits will be increased to something approximating that figure. Whether that result will follow is questionable. It would be necessary that the average loading of grapes be increased to 31,140 pounds to bring the average loading of all deciduous fruits to 30,000 pounds. If the average loading of all fruits remained the same and grapes were loaded to the minimum, the average load would become 29,192 pounds."

From this it is a fair inference that,

(1) The Commission considers it questionable (and therefore improbable) that the average load will increase to 30,000 pounds and this is the figure that must be used to arrive at the revenue of $480 per car, which intervener alleges will result.

(2) The Commission considered 29,192 pounds the proper estimated average load under the new rate. This is the figure petitioners have used to compute the anticipated income and represents an increase of 886 pounds over the present average load per car.

For the purpose of computing the anticipated revenue under the new rates, it is submitted that the basis mentioned by the Commission and used by the carriers is reasonable and proper.

E. Even using the erroneous figures of Intervener, the new rate is confiscatory.

The Intervener claims a gross revenue of about $10.00 per car in excess of the revenues stated in the complaint herein. If its figures were correct (which they are not), the carriers would receive at the maximum $10 per car in excess of their costs;—$10 over costs of $470 per car.

Assuming that the carriers will receive a profit of $10 per car under the new rate, the profit represents that earned by the carriers for transporting a carload of fruit, of an approximate net weight of 15 tons, 2970 miles (R. 20) eastward across the continent and for returning 2400 miles with the empty car (R. 45) (average empty haul of all westbound refrigerator cars), as well as for the further incidental service connected with assembling, re-routing and delivery of freight, the furnishing of expedited service, and the use of expensive and unusual equipment. The average time required in this haul is approximately

thirty days. The cost of such a car is $3194. A 6% return upon the refrigerator car alone for this period of time would be over $15.00. The return of $10.00 is less than 4% on the value of the car while in use, without any return on the roadbed, locomotives or other facilities used in transportation, and without any allowance for the idle time of the car itself. It is not a substantial profit, but a negligible one, and is so low as to violate the constitutional rights of the carriers.

Even if the average revenue under the new rates were the same as that under the old rates ($489.40 per car) the profit over operating costs would be barely sufficient to pay interest on the value of the car while in use on the trip, and would allow nothing to the carriers for the use of their other facilities.

In *Norfolk & Western Ry. Co. v. West Virginia*, 236 U. S. 605, the rates found to be confiscatory yielded 2.5797% above all operating expenses and taxes. Upon the basis of Intervener's unsupported estimate of a revenue of $480 per car a profit of $12.38 per car would be confiscatory under that decision. On Intervener's own showing the profit would be but $9.94, without any allowance for rental of joint facilities.

F. The Carriers' costs.

What does the record before the Commission show as to the carriers' costs? Figures and statistics were introduced by the carriers to show what the costs of the service actually were.

The most comprehensive of these cost studies consisted of a detailed analysis of the actual operating expenses of the Santa Fe Railroad in the year 1923, covering a typical movement. The Commission comments upon this showing as follows (R. 54):

> "No details are given in the cost study so that a check can be made as to the mechanical or clerical accuracy of the result. The methods employed in reaching the result seem to be satisfactory."

The Commission then discusses the manner in which the various items of expense, such as fuel, wages, switching expense, locomotive repairs, etc., were computed and allocated and states (R. 54):

> "Other items were reasonably apportioned to the grape trains."

The carriers' theory was that by ascertaining the costs per car mile for the movement over the Santa Fe, the costs for the average haul of all deciduous fruits could be very closely approximated by applying the same costs to the haul on other railroads. Testimony was introduced to show that the costs for the average haul of all deciduous fruits could be very closely approximated by applying the same costs to the haul on other railroads. Testimony was introduced (R. 482) to show that the haul over the single line of the Santa Fe was probably performed at less cost than the hauls over any of the other routes comprising in each case two or more independent lines. This testimony of the carriers was not contradicted,

nor was it in any way criticized by the Commission in its original report and this basis is recognized as proper in other decisions of the Commission. One of the steps necessary in computing the cost per mile was to estimate and apply the ratio of empty car to loaded car miles, since in the transportation of deciduous fruits, the empty car haul was very greatly in excess of the average empty car haul for other classes of traffic. The carriers' figures showed that the ratio of westbound empty car mileage to total westbound mileage was 81.5% (R. 478), and that the percentage of total empty to total loaded car mileage both eastbound and westbound was 67.58%.

The Commission based the new rates upon an allowance for empty car miles bearing a ratio to loaded car miles of 67.58% (R. 54). The Commission in this manner arrived at a cost to the carriers of $414.02 per car without taxes, rental of equipment or joint facilities (R. 55). After the order was made, the carriers filed with the Commission a petition for reconsideration. One of the grounds urged was that the Commission in fixing the indicated costs at $414.02 a car, exclusive of taxes, had erroneously used 67.58% as the ratio of empty car to loaded car miles, when the proper ratio was 81.5%, and that this error caused an under-valuing of the costs amounting to $20.79 per car.

In its Report on Further Consideration the Commission admits that its action in substituting the lower percentage was erroneous, stating (R. 66):

"In their petition defendants question the propriety of the substitution of the figure of 67.58 for 81.5 as the ratio of empty-car to loaded-car mileage. It is true that this suggestion of a reduction of the allowance for the return of empty cars was unwarranted. The two figures are not comparable. The higher figure is the ratio of the westbound empty-car mileage to the total westbound mileage. The substituted figure represents the ratio of total empty-car mileage both eastbound and westbound to the total loaded-car mileage in both directions."

After admitting that it had made an error in the costs amounting to $20.79 per car, the Commission proceeded (R. 66-67):

"The carriers state that the effect of the erroneous substitution amounted to $20.79 per car, and that if we had merely changed the percentage of empty mileage on the Santa Fe, 68.78 to 67.58, the percentage for all the lines engaged in this traffic, the $414.02 found in the opinion would have become $433.68 per car. This may be compared with revenue, at existing rates of $489.59. The difference, $55.91, would be available for taxes, rental of equipment or joint facilities, and interest, and this difference would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car. In other words, even if the cost study were accepted without question, it would indicate that the prescribed rates are slightly above operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

It also finds (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

When the Commission made its original order it was under the belief that the costs as developed by the carriers' evidence and which it took into consideration were $20.79 per car less than they actually proved to be. Notwithstanding its recognition of this error of $20.79 per car in estimating the costs, the Commission adhered to its former decision. How the lowest possible lawful rate fixed at the time the order was originally made, and based on the erroneous estimate of costs by the Commission, can still remain the lowest possible lawful rate when it is proved and admitted that the actual costs are $20.79 per car higher than they were thought to be when the order was originally made, is something of a mystery. The most that the Commission is willing to say in its Report on Further Consideration (R. 67) is that the difference available

> "for taxes, rental of equipment or joint facilities, and interest would not be eliminated by the prescribed reductions, especially if we assume that the increased minimum load would make some increase in the average revenue per car."

And also that (R. 67):

> "* * * even if the cost study were accepted without question, it would indicate that the prescribed

rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

The fact that the difference between operating expense and revenue under the present rates would not be eliminated by the prescribed reductions is not a finding that the rates are lawful or non-confiscatory. A finding that the prescribed rates are "slightly above the operating expenses" is in effect a finding that the rates are confiscatory. The term "operating expenses", as is indicated by the context, does not include taxes or rentals. A rate slightly above operating expenses certainly is not a compensatory rate.

It may be urged that the Commission did not fix the new rates on the basis of the cost study of the carriers. However, it cannot be denied that it took the figures into consideration, for it said in its original report (R. 58):

> "Considering the relative rates on and earnings of the deciduous-fruit traffic in the light of the condition of the industry and of the service performed by the carriers and giving due weight to the cost study presented by defendants, we are of the view that the present rates are in excess of the lowest possible lawful rates as herein defined."

When it found that it had made an error of $20.79 per car, the Commission, in an endeavor to escape the inevitable conclusion that the rate fixed by it was in error to the same extent, said (R. 68): "While

consideration was given to the cost study submitted by defendants, it was not the controlling factor in our decision". Whether it was the *controlling* factor or not, it was admittedly taken into consideration in arriving at the new rate. The evidence as to the cost of service presented by the carriers was the only evidence before the Commission on that subject. Without the use of the carriers' cost study the Commission had no evidence before it upon which to base its finding that the new rates are the "lowest possible lawful rates compatible with the maintenance of adequate transportation service."

In its Report on Further Consideration, the Commission, forced to admit its error in computation, attempted to discredit the carriers' cost study. In its original report, it had specifically approved the "methods employed in reaching the results" (R. 54). The Commission, in its Report on Further Consideration, states (R. 67) that no details were given and consequently no check could be made as to the mechanical or clerical accuracy of the cost study. The record shows that the cost study was presented by a witness who was subjected to cross-examination (R. 483) and that additional information desired was furnished (R. 489). If there was any doubt about the accuracy of the computations, it was the duty of the Commission and of the complainant to demonstrate that fact when the testimony was being introduced. Under the law (Sec. 20 (5) Interstate Commerce Act) the Commission has ample power to investigate the

carriers' accounts, and thus to develop any errors that might exist in their cost study.

The Commission's criticisms of the carriers' cost study, made for the first time in the Report on Further Consideration, are not justified by any evidence and are entitled to little consideration by this court. They are obviously made for the purpose of escaping the conclusion which inevitably follows the error of computation made in the original report. For this inevitable conclusion that the rates are confiscatory results from the fact that the "lowest possible lawful rates", originally fixed by the Commission, rested upon an error of $20.79 against the carriers; they cannot continue to be the "lowest possible lawful rates" after the error is discovered; they must necessarily now be lower than the lowest possible lawful rates. In view of the Commission's own statement that it had undertaken to fix the lowest possible rate within the carriers' constitutional rights, an admitted error of $20.79 per car requires at least an equal increase in the revenue if a substantial compensation is to be afforded. The "due consideration" given the carriers' costs had not changed between the two reports, but the compensation over costs was admitted to be $20.79 per car less than when the irreducible minimum was prescribed. If the profit is admitted to be $20.79 less than the least profit that could be allowed under the Constitution, how can it still be the "substantial profit" to which the carriers are entitled?

An interesting case upon the value of evidence as bearing on the issue of confiscation is *Northern Pacific*

Ry. Co. v. Department of Public Works, State of Washington, 268 U. S. 39, 43. Here the Department of Public Works of Washington established a rate on saw logs in carload lots. In a court proceeding to annul the decree the two principal carriers "presented evidence tending to show * * * that the rates did not defray fully the operating cost of the traffic and its proportion of the taxes payable". Mr. Justice Brandeis said, referring to the cost data:

> "This evidence was in character persuasive. It was fairly specific, direct, and comprehensive. If the facts warranted, the shippers and the public officials might, of course, have shown by evidence of similar character that the carriers' evidence was inherently untrustworthy; or it might have been overcome by more persuasive evidence to the contrary. Little attempt was made to show that any testimony introduced by the carriers was inherently untrustworthy. Little conflict with the evidence of the carriers was developed by the evidence as to specific facts introduced for the shippers and the public. Apparently necessary inferences from specific facts established by the carriers were not explained away. The Department's findings concerning operating costs rested largely upon deductions from data found in published reports of the carriers and in their exhibits filed in this case. Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems, and made that figure a basis for estimating the operating cost of the log traffic in Washington. This was clearly erroneous."

The same comment might be made on the evidence in this case. The cost evidence introduced by the carriers was in character persuasive. It was fairly specific and direct and comprehensive. If the facts warranted, the shippers and public officials might have shown by evidence of similar character that the carriers' evidence was inherently untrustworthy, or it might have been overcome by more persuasive evidence to the contrary.

From the face of the report of the Commission, it appears:

(a) That the methods employed in determining the carriers' costs were proper;

(b) That the Commission made an error of $20.79 per car in estimating the costs of the carriers, and that it had this erroneous figure before it when it fixed the new rate;

(c) That it is of the opinion that the new rates "are slightly above operating expenses";

(d) That in the opinion of the Commission the new rates "while probably of less than average profitableness, would still leave the traffic attractive to the carriers."

It is submitted that the report of the Commission and the evidence show that the rate fixed is confiscatory, and that the rate fixed was based upon an error in computation necessarily making the new rate at least $20.79 per car lower than it should have been had the Commission not made its error.

SUMMARY.

To recapitulate the contention of the carriers, it is believed that the following positions have been demonstrated:

1. That the Interstate Commerce Commission, in fixing the rate in question, relied entirely upon a supposed mandate to lower existing rates on agricultural products believed to be contained in the Hoch-Smith Resolution.

This fact appears from the face of the Commission's Reports and Orders. It is established:

(a) by the evidence on which the Commission relied in drawing its conclusions;

(b) by the history of the proceeding itself, involving a reversal of a position taken by the Commission only a few months before the present proceeding was instituted;

(c) by the Commission's definition of the issue in the case,—whether the rate assailed "approaches the lowest limit or level of the zone of reasonableness";

(d) by the concurring and dissenting opinions;

(e) by the emphasis laid upon the depressed condition of the deciduous fruit industry;

(f) by the Report and Order on Further Consideration, which finds that the Commission was "not convinced that the rates prescribed are below * * * the lowest possible lawful rates compatible with the maintenance of an adequate transportation service";

(g) by the subsequent references to the opinion herein as based on the Resolution.

2. That even though the order "may have been couched in a form which would cause it, superficially considered" (219 U. S. at p. 443), to appear to involve the determination of the unreasonableness of an existing rate, and the reasonableness of the new rate, in fact it was an order fixing the lowest possible rate conceived to be demanded by the Joint Resolution of Congress referred to.

3. That the Hoch-Smith Resolution was improperly construed by the Commission as requiring it to seek the lowest limit at which a lawful rate could be fixed in a proceeding instituted by shippers for the purpose of having a particular rate reduced as unreasonable.

In fact, the Hoch-Smith Resolution was intended by Congress only as a direction to the Commission to examine the entire rate structure of the country with a view of readjusting rates as an entirety and was intended to have no application to proceedings before the Commission initiated by complaint.

4. That the result of construing the Resolution in the manner in which it was construed and of applying it to proceedings brought on complaint to reduce rates would be disastrous. The race for priorities would result in the most active competition in securing reductions of rates inherently reasonable, because of financial difficulties for which the rates are not shown to be responsible.

5. That the Commission in making the order complained of misconstrued the Hoch-Smith Resolution in other particulars than in respect to its applicability to the sort of proceeding here involved.

(a) It interpreted it as requiring an existing rate to be reduced though not inherently unreasonable;

(b) It interpreted the Resolution as justifying a reduction of rates to the lowest possible limit though the carriers were not making a fair return, and thus treated it in effect as repealing Section 15a of the Interstate Commerce Act;

(c) It misconstrued the expression "freedom of movement" by introducing into words that deal only with transportation matters a meaning involving economic and business problems wholly independent of transportation or the movement of goods;

(d) It viewed the Resolution as requiring it to reduce an established rate complained of, if the shippers showed they labored under financial distress, unless the carriers proved it to be the lowest possible lawful rate;

(e) It considered that its duty under Congressional mandate was to lower an established rate in favor of depressed agricultural interests, merely upon "impressions" and "indications";

(f) It yielded to an assumed command which does not exist in the Resolution to fix the rate at a point where the profit was only "slightly"

above operating expenses and that returned "some" profit, because it believed the lowest possible rate ought to be so fixed under the terms of the Resolution.

6. That the Commission undertook to fix rates pursuant to the Resolution at the lowest possible lawful basis without substantial evidence as to what was the lowest possible lawful rate and erroneously imposed on the carriers the burden of proof that the old rates were the lowest possible lawful rates or that the new rates were less than the lowest possible lawful rates.

7. That the construction given by the Commission to the Resolution raises grave question of its constitutionality. The Commission's construction implies that the Resolution authorizes a subsidy to a depressed industry at the expense of carriers and at the expense of other shippers. These serious questions, involving the whole matter of a federal commercial policy, may be avoided by construing the Resolution as requiring no other or different standard of rate fixing than the Interstate Commerce Act.

8. That the rate fixed is confiscatory, because it does not give the carriers a substantial return over cost properly allocated to the service, but only "some" return or a "slight profit".

9. That the rate was intentionally fixed below the point where there would be a substantial return, because the Commission regarded it as a duty imposed by the Resolution to reduce a rate not unreasonable under the tests adopted and applied in general,

in order to aid the deciduous fruit growers of California.

10. That the Commission after fixing the lowest possible lawful rate, as it conceived it, basing its action in large part upon a cost study, upon a rehearing and reconsideration left the rate so fixed undisturbed, though there was a conceded clerical error of more than $20 per car. In so doing, it necessarily fixed a rate lower than the lowest possible lawful rate.

11. That the finding of the Commission that the new rate is non-confiscatory is not binding on the court since the carriers' petition raises the point and an issue was made on it before the lower court.

12. That the evidence before the Commission shows that the rate is confiscatory.

CONCLUSION.

The questions here involved are legal rather than factual. The reports of the Commission disclose the essential facts relied on. Definite legal propositions are to be passed upon. The applicability of a Joint Resolution of Congress, the construction of that Resolution, the duty of the Interstate Commerce Commission to apply the rules respecting transportation and commerce established by the Interstate Commerce Act, the confiscatory character of the rate fixed under an erroneous reading of a direction given by Congress to a subordinate agency present those "salient circumstances", mentioned by the court in *Illinois Central Ry. Co. v. Interstate Commerce Commission,* 206 U. S. 441, 455, which require a review of the order of the Commission, and an examination of the nature of the power which the Commission undertook to exercise.

It is submitted that Congress by a mere Joint Resolution did not make, or intend to effect, a fundamental and revolutionary change in rate making policy, or upset the principles and plan of railroad regulation that had gradually and painfully developed over more than forty years of experience, trial and error, and which had culminated in the Transportation Act of 1920. Rather does it seem clear that the Resolution is a mere direction to the ministerial officers of the Government to enforce and carry out the provisions of the then existing law so as to give full force and effect to that complete and affirmative policy of regulation prescribed by the Interstate Commerce Act as it has developed through the successive amendments made thereto over a long period of time.

The judgment of the lower court should be reversed and the order made and the rate established by the Commission annulled.

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